Supreme Court, U.S.
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No. _____

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IN THE

Supreme Court of the United States

S.P.,

Petitioner,

v.

V.T.; E.T.; and W.T.M,

Respondents.

(IN RE: IN THE MATTER OF A.M.A., A MINOR)

On Petition for Writ of Certiorari to
the Court of Civil Appeals of Alabama

PETITION FOR WRIT OF CERTIORARI

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98 pp

QUESTIONS PRESENTED

1. Does the federal Adoption and Safe Families Act, 42 U.S.C. §§ 670-679a, require that a state juvenile court, after finding both unmarried biological parents are unable to care for the child, deny custody to her foster mother, who has been rendering excellent care for two and one-half years, and confer custody on a paternal aunt, as a blood relative, despite the determination that the child's best interests under state law lie in granting custody to the existing foster mother?

2. In light of *Suter v. Artist M.*, 503 U.S. 347 (1992), and its progeny, does the federal Adoption and Safe Families Act, 42 U.S.C. §§ 670-679a, which amended the federal Adoption and Assistance Child Welfare Act of 1980, confer on private individuals any right enforceable in state juvenile court against other private individuals competing for custody of a dependent child, whose unmarried, separated biological parents are unable to provide care?

LIST OF PARTIES

Petitioner Sharon Pearson ("S.P.") was an Appellee in the Court of Civil Appeals of Alabama and an Intervenor/Petitioner who petitioned for custody of the minor in the disposition phase of a dependency proceeding in the Juvenile Court of Jefferson County, Alabama. She has served as the foster mother of Amber Marie Allen ("A.M.A.") since June 1997.

Respondent Verna Trosch ("V.T."), a sister of W.T.M. and a paternal aunt of A.M.A., was an Appellant in the Court of Civil Appeals of Alabama and an Intervenor/Petitioner in the trial court.

Respondent Eugene Trosch ("E.T."), the husband of V.T., was designated as an Appellant in the Court of Civil Appeals of Alabama and is discussed in the trial court's orders as if he were a party, but he never formally moved to intervene as a party in the case.

Respondent William Thomas Mason ("W.T.M."), the father of A.M.A., was an Appellant in the Court of Civil Appeals of Alabama and was a Petitioner/Intervenor in the trial court.

Respondent Ginette Dow is the Guardian ad Litem for A.M.A., the minor whose custody is in dispute.

Respondent Alabama Department of Human Resources ("DHR") was a party in the trial court but was not a party on the most recent appeal to the Court of Civil Appeals. DHR initiated the action in the Juvenile Court of Jefferson County by seeking custody of A.M.A, as a dependent child.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Authorities vi

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions Involved 4

Statement of the Case 8

A. The Nature of the Case 8

B. Factual Background and Course of Proceedings Before the Latest Decision of the Court of Civil Appeals of Alabama 9

C. The 2002 Judgment of the Court of Civil Appeals of Alabama 12

Reasons for Granting the Writ 14

1. The Alabama Court's Decision Conflicts with Decisions of Other State Courts. 14

2. The Federal Statute, on Which the Alabama Court Relied, Confers No Rights for a Private Citizen. 16

Conclusion 19

Appendices:

Appendix A
Ex parte W.T.M., No. 2001065, 2002 WL 1003927 (Ala. Civ. App. May 17, 2002) ("*W.T.M. III*") A1

Appendix B
Order of Supreme Court of Alabama dated December 13, 2002, denying S.P.'s petition for writ of certiorari A37

Appendix C
Order of Juvenile Court of Jefferson County, Alabama, dated June 22, 2001, and awarding custody of A.M.A. to S.P. ... A38

Appendix D
W.T.M. v. S.P., 802 So. 2d 1091 (Ala. Civ. App. 2001) ("*W.T.M. II*") A39

Appendix E
Order of Juvenile Court of Jefferson County, Alabama, dated March 7, 2000, and awarding custody of A.M.A. to S.P. ... A49

Appendix F

W.T.M. v. Department of Human Res., 736 So. 2d 1120 (Ala. Civ. App. 1999) ("*W.T.M. I*") A53

Appendix G

42 U.S.C. § 675 ..... A58

Appendix H

Excerpts from S.P.'s petition for writ of certiorari and supporting brief filed with the Supreme Court of Alabama A67

TABLE OF AUTHORITIES

Cases **Page**

Ex parte Allen, No. 1012141,
2002 WL 31439754 (Ala. Nov. 1, 2002) 3

Division of Family Services v. T.W.,
No. 01-03-02TN, 2002 WL 1929548
(Del. Fam. Ct. Jan. 25, 2002) 15

Gonzaga Univ. v. Doe,
536 U.S. 273, 122 S. Ct. 2268 (2002) 18

Ex parte Hails,
814 So. 2d 988 (Ala. 2001) 3

Hathorn v. Lavorn,
457 U.S. 255 (1982) 2

Ex parte Hunte,
436 So. 2d 806 (Ala. 1983) 3

In re L.S. and K.S.,
172 Vt. 549, 772 A. 2d 1077 (2001) 16

Ex parte King,
797 So. 2d 1191 (Ala. 2001) 3

Marylou v. Tenecha L.,
182 Misc. 2d 457,
698 N.Y.S.2d 827 (1999) 16

In the Matter of B.B.,
No. 05-98-02042-CV,
1999 WL 1212255 (Tex. App. Dec. 17, 1999) 15

NAACP v. Alabama ex rel. Flowers,
377 U.S. 288 (1964) 3

NAACP v. State of Alabama ex rel. Patterson,
357 U.S. 449 (1958) 2

Opinion of the Justices No. 330,
558 So. 2d 390 (Ala. 1989) 3

State ex rel. K.A.M.,
809 So. 2d 206 (La. Ct. App. 2001) 16

State ex rel. V.F.R.,
815 So. 2d 1035 (La. Ct App. 2002) 16

Suter v. Artist M.,
503 U.S. 347 (1992) ..... i, 17, 18

Ex parte W.T.M., No. 2001065,
2002 WL 1003927 (Ala. Civ. App.
May 17, 2002) ("*W.T.M. III*") 1, 12-15

W.T.M. v. S.P.,
802 So. 2d 1091
(Ala. Civ. App. 2001) ("*W.T.M. II*") 1, 9, 11

W.T.M. v. Department of Human Res.,
736 So. 2d 1120
(Ala. Civ. App. 1999) ("*W.T.M. I*") 1, 10

White v. Reynolds Metals Co.,
558 So. 2d 373 (Ala. 1989) 3

Statutes, Rules, and Constitutional Provisions **Page**

U.S. Const. art. I, § 8, cl. 1
(the "Spending Clause") 8, 17, 18

28 U.S.C. § 1257(a) 2

42 U.S.C. § 671 ..... 4, 7, 15

42 U.S.C. § 671(a) 12-14

42 U.S.C. § 671(a)(15) 17

42 U.S.C. § 671(a)(19) 2

42 U.S.C. § 675 ..... 7, 13

42 U.S.C. § 678 ..... 8, 18

42 U.S.C. § 1983 17

Adoption and Safe Families Act of 1997,
Pub. L. No. 105-89, 111 Stat. 2115 ..... *passim*

Ala. Code § 12-15-62(c) 2, 9, 11, 12

Ala. Code § 12-15-71 14

Ala. R. App. P. 39 ..... 2, 3

PETITION FOR WRIT OF CERTIORARI

S.P. respectfully petitions this Court to issue a writ of certiorari to review the May 17, 2002, judgment of the Court of Civil Appeals of Alabama reversing the trial court's award of custody of A.M.A. to her.

OPINIONS BELOW

The opinion of the Court of Civil Appeals of Alabama appears in the Appendix to the Petition at Appendix A, page A1, and will be, but has not yet been, published in West's Southern Reporter (second series), the official reporter for Alabama decisions. It has been unofficially published in electronic formats, including Westlaw at 2002 WL 1003927, and Lexis at 2002 Ala. Civ. App. LEXIS 407. The Supreme Court of Alabama denied discretionary certiorari review of that decision without opinion. There are also two earlier decisions in this case by the Court of Civil Appeals: *W.T.M. v. S.P.*, 802 So. 2d 1091 (Ala. Civ. App. 2001) ("*W.T.M. II*") (App. D), and *W.T.M. v. Department of Human Res.*, 736 So. 2d 1120 (Ala. Civ. App. 1999) ("*W.T.M. I*") (App. F). The order of the Juvenile Court of Jefferson County, Alabama, that granted custody to Petitioner S.P. and that was reversed by the Court of Civil Appeals of Alabama is printed in the Appendix to the Petition at Appendix C, page A38, and is unpublished.

JURISDICTION

The Court of Civil Appeals of Alabama issued its decision reversing the trial court's award of custody of A.M.A. to S.P. on May 17, 2002. (App. A.) S.P. filed a petition for discretionary certiorari review with the

Supreme Court of Alabama, and that petition was denied without opinion on December 13, 2002. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

In proceedings below, Respondent V.T. has suggested that this Court does not have jurisdiction to review the May 17, 2002, decision of the Court of Civil Appeals of Alabama because, she claims, Alabama's highest court, the Supreme Court of Alabama, did not decide the case based upon a "procedural bar." However, the federal issue presented here was presented to the Supreme Court of Alabama in a petition for writ of certiorari and brief supporting that petition. (App. H.) S.P. noted that whether the 1998 amendments to Ala. Code § 12-15-62(c) established a "relative preference" that overrides the trial court's discretion to determine the best interest of the child, as was decided by the Alabama Court of Civil Appeals, was an issue of first impression, and she further argued that this preference established by the Court of Civil Appeals' decision was based primarily on its erroneous interpretation of 42 U.S.C. § 671(a)(19).

The Supreme Court of Alabama has discretion over the granting of a petition for writ of certiorari. *See* Ala. R. App. P. 39(a) ("Certiorari review is not a matter of right, but of judicial discretion."). In denying certiorari review without opinion, the court did cite to procedures set forth in Ala. R. App. P. 39, but these do not operate as a procedural "bar." This Court has noted that while "the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question," a "state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Hathorn v. Lavorn*, 457 U.S. 255, 263 (1982); *see also, NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (analyzing Alabama law

to determine whether there was a procedural bar to jurisdiction); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964) (finding "wholly unacceptable" the invocation of a state procedural rule as an argument to bar review).

The provisions of Rule 39 of the Alabama Rules of Appellate Procedure are not strictly adhered to by the Supreme Court of Alabama, and the failure to follow those provisions is not a bar to review. *See Opinion of the Justices No. 330*, 558 So. 2d 390, 391 (Ala. 1989) (granting a writ of certiorari without a petition in a pending case based on a request from the governor for an advisory opinion); *Ex parte Hails*, 814 So. 2d 988, 990 (Ala. 2001) (Johnstone, J., dissenting) ("[P]rocedural compliance with Rule 39 is not jurisdictional in any legally accurate sense of the word. Pursuant to [the Alabama Constitution], we can review the decision of an inferior court at will. Indeed, in the case of *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), this Court issued its writ of certiorari to the Court of Civil Appeals in the utter absence of any petition at all."); *Ex parte Hunte*, 436 So. 2d 806, 810 (Ala. 1983) (reversing the Court of Criminal Appeals and holding that it was not necessary to deal with the State's contention that the petitioner had not complied with Rule 39); *see also, Ex parte King*, 797 So. 2d 1191, 1194 (Ala. 2001) (See, J., concurring) (concurring in the reversal of the Court of Criminal Appeals, and noting that the "Court *generally* will not grant a petition for the writ of certiorari that does not comply with Rule 39" (emphasis added)); *Ex parte Allen*, No. 1012141, 2002 WL 31439754 (Ala. Nov. 1, 2002) (Johnstone, J., dissenting) (stating that while the petition for writ of certiorari does not comply with Rule 39, he would grant the petition based on the dissenting opinion of a judge of the lower court).

Thus, the alleged procedural shortcomings cited by the Supreme Court of Alabama in its denial of S.P.'s petition for writ of certiorari are not a bar to this Court reviewing the

decision of the Court of Civil Appeals of Alabama in this case.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portions of 42 U.S.C. § 671 (as amended by the Adoption and Safe Families Act of 1997, PL 105-89) provide:

> **42 U.S.C. § 671 — State plan for foster care and adoption assistance**
>
> (a) Requisite features of State plan
>
> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which -
>
> . . . .
>
> (15) provides that -
>
> (A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;
>
> (B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families -

(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

(ii) to make it possible for a child to safely return to the child's home;

(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child;

(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that -

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) the parent has -

(I) committed murder (which would have been an offense under

section 1111(a) of title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

(iii) the parental rights of the parent to a sibling have been terminated involuntarily;

(E) if reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D) -

(i) a permanency hearing (as described in section 675(5)(C) of this title) shall be held for the child within 30 days after the determination; and

(ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child; and

(F) reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts of the type described in subparagraph (B);

. . . .

(19) provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards;

. . . .

42 U.S.C. § 671.

A statute containing pertinent definitions, 42 U.S.C. § 675, is reproduced in Appendix G at page A58.

Furthermore, 42 U.S.C. § 678 provides:

42 U.S.C. § 678 — Rule of construction

> Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671 (a)(15)(D) of this title.

42 U.S.C. § 678.

STATEMENT OF THE CASE

A. The Nature of the Case

This case concerns the propriety of a state court using a federal statute, enacted pursuant to the Spending Clause, to resolve an intrastate custody dispute over a "dependent" child between two competing foster parents, and to transfer the child from her foster mother of three and one-half years to another foster mother. The underlying facts are set forth in three reported decisions of the Alabama Court of Civil Appeals involving the same parties. (Apps. A, D & F.) In the last such decision (App. A), the Alabama court resolved the dispute using an interpretation of the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (the "ASFA"), which amends a portion of the United States Code sometimes referred to as the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-679a.

B. Factual Background and Course of Proceedings Before the Latest Decision of the Court of Civil Appeals of Alabama

A.M.A. was born in September 1996. In May 1997, the Alabama Department of Human Resources ("DHR") petitioned for custody of the child by alleging that she was "dependent." She had been born a "crack baby," and her mother was claimed to be using cocaine and not providing adequate care. The mother stipulated to the child's dependency and the child was placed in the temporary custody of DHR. At that time, the father was unknown.

Beginning in June 1997, Petitioner S.P. served continuously as foster mother while the child was in the temporary custody of DHR. In November 1997, Congress enacted the ASFA.

In March 1998, after W.T.M. was determined judicially to be the father, he petitioned for custody. However, he did so jointly with his sister because he had been disabled by a stroke and was unable to care for the child without her help. *W.T.M. v. S.P.*, 802 So. 2d 1091, 1093 (Ala. Civ. App. 2001) ("*W.T.M. II*").

The Alabama legislature amended, in April 1998, its statutes which had provided for DHR, within 18 months of placement of a child in foster care as a result of being "dependent," to present to the juvenile court a permanent plan for the "disposition" of the child. Absent the presentation of such a plan, there existed a "rebuttable presumption that the child should be returned to the family." Ala. Code § 12-15-62(c). The amendment reduced the time period to 12 months, and also elaborated on the purpose of the hearing:

> The purpose of the permanency hearing shall be to determine the permanency plan for the child

> which may include whether, and, if applicable, when, the child shall be (i) returned to the parent, (ii) placed for adoption wherein the Department of Human Resources shall file a petition for termination of parental rights, or (iii) referred for legal custody. The permanency hearing shall determine whether the plan will include placement in another planned permanent living arrangement in cases where the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, be placed for adoption, *or be placed with a fit and willing relative,* or with a legal custodian.

Act No. 372, 1998 Ala. Acts 677 (emphasis added).

In August 1998, the Juvenile Court rejected the father's — W.T.M.'s — petition for custody, and ordered that the child remain in DHR custody, with foster care placement. *W.T.M. II*, at 1093. The Juvenile Court also ordered that W.T.M. and the mother be granted visitation with the child, as arranged by DHR. *W.T.M. v. Department of Human Res.*, 736 So. 2d 1120 (Ala. 1999) ("*W.T.M. I*") (App. F). Accordingly, the child remained under the care of S.P., who was acting as DHR's agent at the time. In April 1999, the Alabama Court of Civil Appeals dismissed the appeal by the father, W.T.M., as untimely. *See W.T.M. I*, 736 So. 2d at 1121.

Shortly after W.T.M.'s appeal was dismissed, and after the child had been in S.P.'s continuous care for almost two years, in May 1999, W.T.M.'s other sister, V.T., moved to intervene and petitioned for custody. Then, in June 1999, Petitioner S.P. also intervened and sought legal custody of the child, independent of DHR. *W.T.M. II*, at 1093.

Furthermore, DHR recommended that custody be granted to V.T., the father's sister. *See W.T.M. II*, at 1092 (noting that DHR was an appellant of the order granting custody to S.P.).

The Juvenile Court treated these petitions for custody as a petition to modify its previous order and issued a judgment awarding custody to Petitioner S.P. in March 2000. In its order, the court recognized that the child had been under the actual care of Petitioner S.P. for two and one-half years. In light of reports by DHR, S.P. was found to have provided the child "with a loving, nurturing environment, and excellent care." The court found that a transfer of custody to V.T. would uproot the child and not materially promote her welfare. The court also provided for periodic visits with V.T. The effect was to end the custody of DHR. V.T. and the disabled father, W.T.M., appealed. Despite its reports that S.P. was providing excellent care, DHR also appealed.

In May 2001, the Alabama Court of Civil Appeals reversed the March 2000 award of custody on the ground that the Juvenile Court applied the wrong standard for evaluating the proper custodian. Instead of evaluating the evidence according to the "best interest" of the child, the Juvenile Court was determined to have evaluated the evidence erroneously according to whether a change in custody would materially promote the welfare of the child. *W.T.M. II*, 802 So. 2d at 1093. The appellate court also urged the Juvenile Court to consider on remand the effect of Ala. Code § 12-15-62(c). *Id.*, at 1094. The case was remanded for further consideration in light of this "best interest" standard.

On remand, the Juvenile Court found that the best interest of the child was in the custody of Petitioner S.P. The court issued a short order which referred to the fact that S.P. had physical custody of the child for, at that point, three and one-half years and had provided her with a loving and

nurturing environment and excellent care. (App. C.) Again, V.T. and the disabled father, W.T.M., appealed.

C. The 2002 Judgment of the Court of Civil Appeals of Alabama

In its 2002 decision, the Court of Civil Appeals reversed the Juvenile Court's decision to grant custody to Petitioner S.P., with four of five judges voting to reverse. *Ex parte W.T.M.*, No. 2001065, 2002 WL 1003927 (Ala. Civ. App. May 17, 2002) (App. A.) ("*W.T.M. III*"). The court concluded that the evidence was insufficient to award custody to Petitioner S.P., as against the desire of V.T., a "relative," for custody.

For the first time, and without any briefing by any of the parties, the appellate court ruled that Ala. Code § 12-15-62(c) had been adopted to comply with a 1997 federal statute for providing funding to a State, the ASFA. After the enactment of the 1998 Alabama legislature amendments, the main opinion wrote that Ala. Code § 12-15-62(c) provides a "preference for placement of a dependent child with a 'fit and willing relative,' [which] is derived from 42 U.S.C. § 671(a)." *W.T.M. III*, 2002 WL1003927, at *3-4. The opinion then began a multi-paragraph discussion of 42 U.S.C. § 671(a), to explain its construction of Ala. Code § 12-15-62(c):

> That section sets forth the requirements for states to obtain federal appropriations for "foster care and transitional independent living programs for children." Subsection (19) of § 671(a) states:
>
> "In order for a State to be eligible for payments under this part, it shall have a

> plan approved by the Secretary [of Health & Human Services] which--
>
> "....
>
> "(19) provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant State child protection standards."

W.T.M. III, 2002 WL 1003927, at *4.

Two judges concurred in the result only, for reasons not expressed. One dissenting judge strongly disagreed with the main opinion's resolution of the case and its interpretation of the federal statute. He wrote:

> The main opinion also relies upon 42 U.S.C. §§ 671(a) and 675, part of the federal Adoption and Safe Families Act of 1997. These federal statutes do not purport to prescribe rules of decision for state courts in dependency cases. Clearly, the rules of decision in our dependency cases are stated in Alabama statutes and in our precedents.[12] Nowhere does 42 U.S.C. § 671(a) or 42 U.S.C. § 675 or any other federal statute of which I am aware, state that the courts of Alabama must always select a relative over a nonrelative in a custody determination. I do not believe Congress intended to dictate to the states that they must always place a child with a nonparent relative, even when such a placement is not in the best interests of the child. I certainly find no

> authority requiring that a federally imposed "relative" preference must override a state court's determination of a child's best interests. It is my conclusion that the decisions of this court, and those of Alabama trial courts, remain governed by the best interests of the children, which has always been the polestar for our decisions in this area.
>
> ---
>
> [12]Even if § 671(a) did purport to alter the rule of decision for state courts, it would require only that a fit and willing relative be "considered" for preference.

W.T.M. III, 2002 WL 1003927, at *13 (Murdock, J. dissenting) (second footnote omitted).

S.P. sought discretionary review at the Supreme Court of Alabama, and complained that the Court of Civil Appeals had imported a "relative placement preference" from the federal statute. (App. H.) The discretionary review was denied on December 13, 2002. (App. B.)

REASONS FOR GRANTING THE WRIT

1. The Alabama Court's Decision Conflicts with Decisions of Other State Courts.

The Alabama Court of Civil Appeals' reversal of the Juvenile Court was in error. The decision purported to be based on an interpretation of the "best interests" of the child standard in Ala. Code § 12-15-71 that the court concluded was required by the operation of what it believed to be a mandatory preference for "an adult relative" provided by the federal Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a) et seq., particularly its provisions

concerning placement of a child with a family member. *See Ex parte W.T.M.*, Nos. 2001064, 2001065 & 2001069, 2002 WL 1003927, at *4-5 (Ala. Civ. App. May 17, 2002) ("*W.T.M. III*"). Petitioner S.P. does not believe that the federal law reaches as far as the Court of Civil Appeals claimed. The statute relied upon – 42 U.S.C. § 671 – does not require that state courts resolving custody disputes over foster children do so by preferring an adult relative. Even if the ASFA were applicable to private disputes in a court, it provides only that the State "consider giving preference to an adult relative . . . ."

The Alabama decision conflicts with the decision in *Division of Family Services v. T.W.*, No. 01-03-02TN, 2002 WL 1929548 (Del. Fam. Ct. Jan. 25, 2002), which adopts the more limited reading of the ASFA urged by Petitioner here. As explained by the Delaware court, the wording of the ASFA "does not absolutely require the placement with relatives, only that the placement with relatives be 'considered' . . . ." *Id.* at *15.

The Alabama decision also conflicts with the Texas appellate decision of *In the Matter of B.B.*, No. 05-98-02042-CV, 1999 WL 1212255 (Tex. App. Dec. 17, 1999). There, the court held that the "best interests" of the child precluded placement with the biological parent's brother with alcohol and drug issues. The Texas court ruled that its determination of best interests was consistent with the ASFA, particularly the provisions related to the efforts to place the child with a family member.

The Alabama Court of Civil Appeals referred to four decisions in other jurisdictions, which it claimed recognize "in their state statutes concerning permanency hearings for dependent children, . . . a 'relative-placement preference' corresponding to federal legislation." *W.T.M. III*, at *4 (App. A, at A10). None of these decisions grounds a construction of state law on the meaning of the federal

ASFA. The first case cited, *State ex rel. V.F.R.*, 815 So. 2d 1035 (La. Ct. App. 2002), merely involves the termination of parental rights, not a determination of custody. The second case cited, *State ex rel. K.A.M.*, 809 So. 2d 206 (La. Ct. App. 2001), involves the affirmance of a trial court's discretion to award custody to paternal grandparents instead of foster parents and the failure to conduct a permanency hearing in timely fashion. There is no assertion that the ASFA requires the outcome. Rather, there is only a reference to the ASFA as the inspiration for passage of the state statute which the court construed. The third case cited, *Marylou v. Tenecha L.*, 182 Misc. 2d 457, 698 N.Y.S.2d 827 (1999), reports that New York's statutes on custody of foster children were amended "to conform with the federal Adoption and Safe Families Act of 1997 . . . [and] create a new proceeding." Despite this reference, the New York decision makes no reference to the text of the federal statute as a means of statutory construction. In the fourth case cited, *In re L.S. and K.S.*, 172 Vt. 549, 772 A. 2d 1077, 1078 (2001), there is no reference to the ASFA. In sum, these decisions do not rely on federal law to the extent of the Alabama Court of Civil Appeals in the decision under review.

2. The Federal Statute, on Which the Alabama Court Relied, Confers No Rights for a Private Citizen.

The better view of the effect of the ASFA on the "best interest" of the child standard, used to resolve private claims to child custody, is the one adopted by the Texas court. The ASFA is consistent with the best interests of a foster child in a custody dispute. Neither the ASFA nor the statute with which it is codified are meant to resolve private disputes over child custody.

In *Suter v. Artist M.*, 503 U.S. 347 (1992), this Court determined that the Adoption Assistance and Child Welfare Act (the "Child Welfare Act") did not confer any right on private individuals to enforce its terms. The Court found that the statute, codified at 42 U.S.C. §§ 670-679a, just like the ASFA, is merely a statute that regulates the terms for providing funds to a State. Therefore, the private plaintiffs had no right, in the name of the Child Welfare Act, to obtain relief from a court that requires the state child welfare agency director "make reasonable efforts to prevent removal of children from their homes [or] to facilitate reunification of families where removal had occurred, " as provided in 42 U.S.C. § 671(a)(15). *See Suter*, 503 U.S. at 352, 363.

In *Suter*, the Court focused on the introductory text of § 671, which prescribes eligibility for payments authorized by federal executive officials:

> Here, the terms of § 671(a) are clear: "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary." Therefore the Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features.

503 U.S. at 358. For this reason, the provision in § 671(a)(15) that the plan require "reasonable efforts be made" for family reunification was sufficiently ambiguous that it imposed on the State a generalized duty, not a right capable of enforcement by a private citizen. In general, statutes enacted pursuant to the U.S. Constitution's Spending Clause must confer the private right to sue in unambiguous fashion for it to be recognized. Thus, this Court held in the *Suter* case that no "right" covered by the language of 42 U.S.C.

§ 1983 authorizing suit was involved, and it held further, for the same reason, that Congress did not impliedly authorize a private suit remedy in the Act itself. *See Suter*, 503 U.S. at 363-64; *see also, Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 2274-76 (2002) (citing *Suter*, noting that recent decisions "have rejected attempts to infer enforceable rights from Spending Clause statutes," and discussing the analysis undertaken to evaluate whether a private right enforceable by a private remedy has been created).

In light of this ruling, it is unlikely that the ASFA's 1997 amendments to the Child Welfare Act conferred on private individuals any rights applicable to this dispute. The 1997 amendments did not alter the fundamental structure of the Act, which merely regulates the spending of money with State governments. The amendments only added conditions to the funding of a State.

The Court of Civil Appeals' reliance on § 671(a)(19), at *4 (App. A, at A8-A10), another condition to funding, adds no weight to its position. In a nutshell, the putative violation of a federal law, as construed by the Court, is not the same as the violation of a federal right of any private party to an actual dispute.

At most, the ASFA imposes a duty on the State's child welfare agency, and no one has alleged in this case that DHR failed to fulfill this duty. Moreover, as the history of the AMA case shows, DHR fulfilled any duty it had under the statute. DHR has advocated a preference for V.T., and that certainly avoids the risk that DHR's actions in this case could be construed to violate its duty to the United States.

However, neither the ASFA nor DHR's requests impose any responsibility on the Juvenile Court to alter the manner in which it determines the best interests of the minor child. Thus, Congress provided in Section 101 of the AFSA, codified in 42 U.S.C. § 678: "Nothing in this part shall be construed as precluding State courts from exercising their

discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671(a)(15)(D) of this title."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

Rel: 05/17/2002 Ex parte W.T.M.

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2001-2002

2001065

Ex parte W.T.M.

PETITION FOR WRIT OF MANDAMUS

(In re: The matter of A.M.A., a minor)

Jefferson Juvenile Court, Bessemer Division
(JU-97-700254.01)

2001064

W.T.M.

v.

A2

S.P.

2001069

V.T. and E.T.

v.

S.P.

Appeals from Jefferson Juvenile Court,
Bessemer Division
(JU-97-700254.01)

CRAWLEY, Judge.

The appeals in this case represent the third appeal of a judgment awarding physical custody of A.M.A., a dependent child now five and one-half years old, to her foster mother, S.P. *See W.T.M. v. Department of Human Res.*, 736 So. 2d 1120 (Ala. Civ. App. 1999) ("*W.T.M. I*"); *W.T.M. v S.P.*, 802 So. 2d 1091 (Ala. Civ. App. 2001) ("*W.T.M. II*"). The father has also petitioned for a writ of mandamus directing the juvenile court award custody to the paternal aunt and uncle. The facts and procedural history were set out in *W.T.M. II* as follows:

> "The parents of A.M.A. are not, and have never been, married to each other. In 1997, [the Department of Human Resources ('DHR')] filed a dependency petition, alleging that A.M.A., who was then an infant, was dependent because, it said, she had been born a 'crack baby' and her mother, it claimed, was using cocaine and not providing

adequate care for her. DHR obtained protective custody of A.M.A., and the child was placed in foster care.

"In February 1998, W.T.M., who had established a relationship with A.M.A. at birth, was judicially determined to be her father. In March 1998, W.T.M., along with his sister S.B., petitioned for joint custody of the child, alleging that W.T.M. had suffered a disabling stroke and was unable to care for the child without help. After a dispositional hearing in August 1998, the juvenile court ordered that the child remain in the custody of DHR, with foster-care placement. W.T.M. and S.B. appealed that order to this court, but the appeal was dismissed as untimely. *See W.T.M. v. Department of Human Res.*, 736 So. 2d 1120 (Ala. Civ. App. 1999).

"In May 1999, V.T., another sister of W.T.M. and the child's paternal aunt, moved to intervene and, along with her husband, petitioned for custody of A.M.A. In June 1999, S.P., the child's foster mother, also moved to intervene and sought custody. The juvenile court granted both motions to intervene and, following a dispositional hearing, awarded custody to S.P. and granted specific rights of visitation to the father as well as to V.T. and her husband.

"The judgment states, in part:

> " 'After reviewing the law submitted by counsel for the parties, and hearing argument regarding the burden of proof

required in this cause, this Court finds that said Petitions filed by child's Paternal Aunt and Uncle, and by child's Foster Parent should be considered as Petitions to Modify the child custody Order issued by this Court on August 7, 1998, granting custody of said child to [DHR]. In modification proceedings, the standard of proof is set out in [*Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984)], whether a change in custody would materially promote the welfare of the child. The reason for this stricter standard is that uprooting children and moving them can be very traumatic.

" 'This Court finds that there have been no substantial changes in circumstances as presented by the paternal Aunt and Uncle that would materially promote the welfare of the child by changing custody from the Foster Parent to the Paternal Aunt and Uncle. This Court notes that said child has been in the custody of her Foster Parent during the past 2 ½ years where according to DHR reports said Foster Parent has provided child with a loving, nurturing environment and excellent care. Due to the fact that said child was found dependent by this Court on September 23, [1997], pursuant to Title 12-15-71(a)(3)(c), Alabama Code 1975, a child found dependent may be awarded to a relative or other individual who, after

> study by [DHR], is found by the Court to be qualified to receive and care for the child. Therefore, the care, custody, and control of said minor child ... is hereby awarded to her Foster Parent [S.P.], with whom [DHR] placed said minor child approximately 2 ½ years ago.'"

802 So. 2d at 1092-93. In *W.T.M. II*, this court held:

> "[T]he trial court applied the *McLendon* standard, which was too stringent a burden of proof. Therefore, this cause must be remanded with instructions for the trial court to apply the correct standard, the 'best interest' standard. *See Ex parte Perkins*, 646 So. 2d 46 (Ala. 1994). In its determination of the child's best interest, the juvenile court should keep in mind § 12-15-62(c), Ala. Code 1975 (mandating that '[i]f a permanent plan is not presented [by DHR] to the court [within 18 months of an order placing a child in foster care] there shall be a rebuttable presumption that the child shall be returned to the family'); the decision in *R.C. v. Nachman*, 969 F. Supp. 682 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir.1998) (stating that DHR has the affirmative duty to facilitate family reunification whenever that goal is possible); and § 12-15-1.1, Ala. Code 1975 (stating the legislative goal of family reunification in juvenile dependency cases).
>
> "The judgment of the juvenile court is reversed, and the cause is remanded with instructions to apply the 'best interest' standard to the disposition of this dependent child."

802 So. 2d at 1094.

Citing *Ex parte Perkins*, 646 So. 2d 46 (Ala. 1994), this court remanded the cause to the juvenile court to apply the "best-interest" standard. The rule of *Perkins* is that when the trial court uses an improper, higher standard to deny relief to a party requesting a modification of a prior custody order, the appellate court will not review the evidence under the correct lower standard and direct the award of custody. Instead, the appellate reverses the judgment and remands the cause for the trial court to make a custody determination, applying the correct standard. *Ex parte Perkins*, 646 So. 2d at 46-47.[1]

On remand in this case, the juvenile court entered the following order:

> "In accordance with an Order issued by the Alabama Court of Civil Appeals, ... instructing this Court to apply the 'best interest' standard in this

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[1] In *Perkins*, the trial court applied the standard established in *Ex parte Terry*, 494 So. 2d 628 (Ala. 1986), to deny a father's request for a custody modification. This court held that the trial court had erred by using the *Terry* standard when it should have used the standard established in *Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984). This court then reviewed the evidence and determined that the father had met the *McLendon* standard; we remanded the case with directions for the trial court to award custody to the father. The Alabama Supreme Court reversed our judgment, holding that this court had no authority to direct an award of custody, but had the authority only to remand for the trial court to apply the correct standard.

> dispositional hearing of a dependent child, this Court finds that it is in the best interest of said minor child that her custody remain with [S.P., the foster mother] who has had physical custody of said minor child for the past 3-1/2 years and has provided said child with a loving and nurturing environment, and excellent care. Child's Paternal Aunt and Uncle shall have the standard rights of visitation with said minor child as previously Ordered by this Court on March 7, 2000."

From the juvenile court's order on remand, the father (case no. 2001064) and the paternal aunt and her husband (case no. 2001069) appealed to this court. The father also petitioned for a writ of mandamus, directing the juvenile court to award custody to the paternal aunt and uncle (case no. 2001065). We hold that the juvenile court erred by determining that it was in A.M.A.'s best interest to be placed in the custody of her foster mother, S.P.

The juvenile court's factual findings — that S.P. had had physical custody of the child for 3-1/2 years, that S.P. had provided the child with a loving and nurturing environment, and that S.P. had given the child excellent care — are fully supported by the record. However, those factual findings are insufficient, as a matter of law, to overcome the statutory policies and preferences expressed in § 12-15-1.1 and § 12-15-62(c), Ala. Code 1975.

Section 12-15-1.1 states, as a legislative goal for the juvenile court, that the court should "preserve and strengthen the child's family whenever possible" and should maintain "a preference at all times for the preservation of the family." *See* § 12-15-1.1(1) and (8). Section 12-15-62(c) states a preference for placing a dependent child who has

been in long-term foster care with a relative over an unrelated caregiver.

Judge Murdock's dissenting opinion cites our decision in *W.T. v. State Department of Human Resources*, 707 So. 2d 647, 651 (Ala. Civ. App. 1997), for the proposition that § 12-15-71 gives the juvenile court "'the broadest possible range of placement options in the dispositional phase of a dependency proceeding.'" — So. 2d at —. It is true that, based on the law as it existed when *W.T.* was decided, the juvenile court was not required to give priority to placing a dependent child with a relative over an unrelated caregiver. After our decision in *W.T.*, however, the Alabama statutes relating to the disposition of dependent children (§§ 12-15-62 and 12-15-65) were amended, effective April 22, 1998, to comply with two pieces of congressional legislation, namely: (1) the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) ("the ASFA") (codified at 42 U.S.C. §§ 671 and 675) and (2) the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, § 505(3), 110 Stat. 2104 (August 22, 1996), now codified, in relevant part, at 42 U.S.C. § 671(a).

Most of the Alabama amendments appear at § 12-15-62(c) and § 12-15-65(a), (m), and (n). The 1998 amendments added three sentences to subsection (c) of § 12-15-62, the first two of which are pertinent here:

> "The purpose of the permanency hearing shall be to determine the permanency plan for the child which may include whether, and, if applicable, when, the child shall be (i) returned to the parent, (ii) placed for adoption wherein the Department of Human Resources shall file a petition for termination of parental rights, or (iii) referred for

> legal custody. The permanency hearing shall determine whether the plan will include placement in another planned permanent living arrangement in cases where the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, be placed for adoption, or be *placed with a fit and willing relative,* or with a legal custodian."

(Emphasis added.) In *W.T.*, we held that § 12-15-71 stated no preference for placing a dependent child with a parent, family member, or other relative. After the 1998 amendments to § 12-15-62(c), however, the "relative preference" does, as Judge Murdock's dissenting opinion suggests, "override[] the Legislature's express grant of broad discretion to the trial court in § 12-15-71(a)." — So. 2d at —.

The preference for placement of a dependent child with a "fit and willing relative" is derived from 42 U.S.C. § 671(a). That section sets forth the requirements for states to obtain federal appropriations for "foster care and transitional independent living programs for children." Subsection (19) of § 671(a) states:

> "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary [of Health & Human Services] which —
>
> "....
>
> "(19) provides that the State shall consider giving preference to an adult relative over a non-

> related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant State child protection standards."

Other jurisdictions have recognized that, in their state statutes concerning permanency hearings for dependent children, there is a "relative-placement preference" corresponding to federal legislation. *See, e.g., State ex rel. V.F.R.*, 815 So. 2d 1035 (La. Ct. App.2002); *State ex rel. K.A.M.*, 809 So. 2d 206 (La. Ct. App.2001); *Marylou L. v. Tenecha L.*, 182 Misc.2d 457, 458, 698 N.Y.S.2d 827, 829 (1999); *In re L.S. and K.S.*, 172 Vt. 549, 549, 772 A.2d 1077, 1078 (2001).

In passing the ASFA, Congress emphasized two themes: that the primary goal of the child welfare system is to secure the safety of children who enter the system and that children should not languish for extended periods in foster care without a plan for their timely permanent placement. *See, e.g.*, David J. Herring, *The Adoption and Safe Families Act--Hope and its Subversion*, 34 Fam. L.Q. 329, 329 (2000); Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997: Confronting an American Tragedy*, 46 La. B.J. 477, 478 (April 1999).

> "ASFA introduces rather specific procedural measures and time lines designed to achieve timely permanent placements. First, ASFA requires a judicial hearing twelve months after the date on which the child entered foster care. This hearing is no longer labeled the 'dispositional hearing,' but is now termed the 'permanency hearing.' At this hearing, the judge is to determine whether the child will be returned to his or her

> parents, placed for adoption (following the termination of parental rights), referred for legal guardianship, or placed in another planned permanent living arrangement. ASFA allows the judge to order the latter permanency outcome only if the agency has documented compelling reasons as to why the other permanent outcomes would not be in the child's best interests."

Herring, 34 Fam. L.Q. at 338-39 (footnotes omitted).

The ASFA requires a State agency like DHR to petition for the termination of parental rights when any child has been in foster care for 15 of the last 22 months. *See* 42 U.S.C. § 675(5)(E). There are only three exceptions to this requirement: (1) *if the child is being cared for by a relative;* (2) if the State agency has documented in its case plan a compelling reason for determining that a petition to terminate parental rights is not in the best interest of the child; and (3) if the State has not provided the child's family with "such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts ... are required to be made with respect to the child." *See* 42 U.S.C. § 675(5)(E)(i)-(iii). *See* Herring, 34 Fam. L.Q. at 339-40 (stating that "[t]he agency can avoid the [termination-of-parental-rights-and-] adoption outcome if it has placed the child with a relative or has documented a compelling reason that termination of parental rights and adoption would not be in the best interests of the child").

In the present case, DHR recommended, pursuant to § 12-15-62(c)--and consistent with the mandate of 42 U.S.C. § 675(5)(E)(i)--that the child be placed with V.T. and E.T., her paternal aunt and uncle. The evidence demonstrates that V.T. and E.T., the father's sister and brother-in-law, are

willing and able to assume physical custody of the child, that the child has developed a relationship with them, and that they are fit and loving caregivers. The undisputed evidence indicates that the father has had a relationship with the child since her birth and that, but for the father's debilitating stroke and the resulting physical limitations, he would himself be petitioning for custody of the child. Given the father's limitations, awarding custody of the child to the paternal aunt and uncle is the nearest approximation to a real parent-child relationship possible for W.T.M. and A.M.A. The mere fact that the child has been in S.P.'s foster care for a long time is insufficient, as a matter of law, to prevail over the policies and preferences that support placing the child with her relatives.

Judge Murdock's dissenting opinion states:

> "If the evidence ... was insufficient as a *matter of law* to rebut the presumption favoring placement with a relative or to allow the trial court to use its discretion to determine that a permanent award of custody to S.P. was in the child's best interests, we could have said so then. We did not. Instead, we remanded the case to the trial court to exercise its discretion and to determine the best interests of the child based on [the] record. The trial court did that."

— So. 2d at —. In *W.T.M. II*, we did not state that the evidence was insufficient as a matter of law to support the trial court's judgment awarding custody to the foster mother; the trial court's judgment was based on an incorrect standard and it was necessary to remand the case to the trial court with directions that it (1) conduct another review of the record applying the correct standard and then (2)

redetermine the custody award. This court had no authority to redetermine custody. *See Ex parte Perkins,* supra. On return to remand, we could affirm the court's *redetermination of custody* if that redetermination was supported by additional factual findings (based on the original record) indicating that the paternal aunt and uncle were either unfit or unwilling to have custody of the child. Here, the trial court made factual findings that were insufficient as a matter of law. Because of our disposition of the appeal, the father's petition for the writ of mandamus is denied as moot.

The judgment of the juvenile court is reversed.

2001064 and 2001069--REVERSED.

2001065--PETITION DENIED.

PITTMAN, J., concurs.

YATES, P.J., and THOMPSON, J., concur in the result.

MURDOCK, J., dissents.

MURDOCK, Judge, dissenting.

The lead opinion in the second appeal of this case, *W.T.M. v. S.P.*, 802 So. 2d 1091 (Ala. Civ. App.2001) ("*W.T.M. II*"), concluded that the judgment of the trial court was the result of a dispositional hearing in a dependency proceeding, not a change of custody under *Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984). It therefore reasoned that the "material-promotion" standard of *McLendon* did not apply and that, as a result, the case should be remanded for the trial court to determine custody upon application of a

"best-interests" standard. After reviewing the record and the trial court's judgment on remand, I see no basis for concluding that the trial court did not follow the mandate of this court and the concomitant law of this case.[2]

The record in this case reveals that the child, A.M.A., was born in September 1996. When A.M.A. was seven months old, DHR obtained protective custody of her. In June 1997, when A.M.A. was nine months old, S.P. became her foster mother. A.M.A. was approximately three and one-half years of age at the time of the March 2000 judgment at issue here. Of that three and one-half years, she had lived with S.P. almost three years. By the time the trial court issued its judgment on remand on June 22, 2001, based upon the "best-interests" standard that we mandated in *W.T.M. II*, A.M.A. was almost five years old and had lived with S.P. for approximately four years immediately preceding that judgment.

It was undisputed that S.P.'s home was suitable for A.M.A. and that S.P. and A.M.A. had a very close and loving relationship. Even V.T., A.M.A.'s paternal aunt, admitted that S.P. had "done a pretty good job of raising" the child and that the child was well-adjusted, outgoing, and vivacious. The record reflects that S.P. was 41 years old and had three other foster children (two boys and one girl, ages 8, 7, and 5, respectively), all of whom she had had custody of for over four years and was attempting to adopt. A representative of DHR testified that the four children,

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[2] No petition was filed seeking certiorari review by the Supreme Court of the mandate in *W.T.M. II* that the trial court apply a best-interests standard. That mandate therefore is the law of this case. *See, e.g., Ex parte Jones*, 774 So. 2d 607 (Ala. Civ. App.2000).

who had grown up together, were "very, very bonded.... They're extremely close. The two boys ... that's their sister and [A.M.A.] thinks of [the other foster children] as those are my brothers and [sister]."

The record reflects that S.P. and the children regularly attended church together and that the children likewise participated in Sunday school and in a missions program held at the church on Wednesday nights. S.P.'s sister, who lives in Georgia, testified that she and her three children visited S.P. "every two or three months," that the sister's family and S.P. and the four children S.P. cared for had spent Thanksgiving together each of the last three or four years and that the families had spent Christmas together along with S.P.'s mother and another sister. The record also reflects that S.P.'s mother regularly assisted S.P. in caring for the four children and that A.M.A. had formed a positive relationship with S.P.'s extended family.

S.P. testified that, although she had filed for a divorce from her husband, she could provide for all of the children financially; it was undisputed that the child had been well cared for physically, as well as emotionally. S.P. further testified:

> "Q: And what was the reason that you filed--or asked to intervene in this case and filed for custody?
>
> "A: I have just felt like in this amount of time it was not in her best interest to be placed. And [the DHR worker] had told me before that she had talked to [V.T.] and that she said she didn't want any more children. And I in my mind started thinking that

everybody was doing this together and that it really wasn't for the best interest of her.

"Q: And, so, you have bonded with her as your child?

"A: Yes, I have.

"Q: And you don't have any kind of ulterior motive or other motive other than the care of the child do you?

"A: No.

"....

"Q: And the only reason that you're in court today is that you think that it is in [the child's] best interest that she stay where she is?

"A: I think at this point in her age and as long as she's been where she is, it's in her best interest to stay where she's at."

At the time of trial, V.T. and her husband, E.T., were both 54 years of age. Although DHR had approved of V.T. for placement of the child, the record reflects that V.T. and E.T. had not attempted to obtain custody in 1998.[3] Further, the record reflects that E.T. had been arrested twice – once

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[3] V.T. testified that, at the time, she thought her sister would be approved for custody and that her sister would have been a better caregiver for the child at that time. *See W.T.M. v. Department of Human Res.*, 736 So. 2d 1120 (Ala. Civ. App. 1999).

in March 1997 and again in September 1997 – for driving under the influence of alcohol, although he had not been convicted of either offense. E.T. admitted that he had continued to drive home on occasion after he had "had two or three beers at the Stadium Grill.... I mean, it's kind of hard to stop at Applebee's or wherever and not drive to get home whether you have one or twenty."

A representative of DHR testified that, although DHR's policy was to seek a relative for placement when an appropriate relative could be located, in the representative's five and one-half years of experience with DHR she had never known DHR to remove a child from a home after the child had been placed in the home as an infant and had remained in the home for three years.

A.M.A. is now five and one-half years old. Every witness testified that the child is a happy, loving child. The trial court, in its discretion, awarded custody of A.M.A. to S.P., who has had physical custody of the child since she was an infant and who has provided the only home, and in a real sense, has been the only mother, the child has ever known.

Because the lead opinion in *W.T.M. II* considered this case to involve a dependency proceeding, our mandate that the trial court apply a "best-interests" standard on remand was consistent with Ala. Code 1975, § 12-15-71(a). That statute provides, in pertinent part:

> "If a child is found to be dependent, the court may make any of the following orders of disposition *to protect the welfare of the child:*

"(1) Permit the child to *remain* with the parents, guardian, or *other custodian* of the child, subject to conditions and limitations as the court may prescribe.

"(2) Place the child under protective supervision as herein provided or under the supervision of the Department of Human Resources.

"(3) *Transfer legal custody* to any of the following:

"a. The Department of Human Resources; provided, that the department is equipped to care for the child.

"b. A local public child-placing agency or private organization or facility willing and able to assume the education, care, and maintenance of the child and which is licensed by the Department of Human Resources or otherwise authorized by law to receive and provide care for the child.

"c. A relative or *other individual* who, after study by the Department of Human Resources, is *found by the court to be qualified to receive and care for the child.*

"(4) *Make any other order as the court in its discretion shall deem to be for the welfare and best interests of the child.*"

(Emphasis added.)

Consistent with § 12-15-71(a), we have long stated in both child custody and dependency cases, that the primary concern is the best interests and welfare of the child. *E.g., McKinney v. Alabama Dep't of Pensions & Sec.*, 475 So. 2d 568 (Ala. Civ. App. 1985); *Melton v. State Dep't of Pensions & Sec.*, 448 So. 2d 392 (Ala. Civ. App. 1984); *Price v. Price*, 440 So. 2d 1110 (Ala. Civ. App. 1983). Even our law's recognition of a presumption of custody in favor of a natural parent finds its genesis in the concern for the best interests of the child:

> "The law devolves the custody of infant children upon their parents, not so much upon the ground of natural right in the latter, as because the interests of the children, and the good of the public, will, as a general rule, be thereby promoted. It is a fair presumption, that so long as children are under the control of their parents, they will be treated with affection, and their education and morals will be duly cared for."

Striplin v. Ware, 36 Ala. 87, 89 (1860) (quoted with approval in *Ex parte D.J.*, 645 So. 2d 303 (Ala. 1994)). *See also Ex parte Mathews*, 428 So. 2d 58, 59 (Ala. 1983) ("The prima facie right of a natural parent to the custody of his ... child, as against the right of custody in a nonparent, is grounded in the common law concept that this primary parental right ... *is* in the best interest and welfare of the child as a matter of law.").

Obviously, it is quite relevant to a determination of a child's best interests and welfare "to consider ties of affection resulting from years of association between the child and its custodian." *Dale v. Dale*, 54 Ala. App. 505, 507, 310 So. 2d 225, 227 (1975) (custody determination in a

divorce case). In *Borsdorf v. Mills*, 49 Ala. App. 658, 275 So. 2d 338 (1973), this court explained:

> "To tear [a child] from his home and those he knows as his parents and the source of love, safety and security merely to give sanction to a principle of priority of right is unconscionable. The principle of priority of right of a parent to custody is founded upon the premise that because of a blood relation and instinct, such parent will better love and care for a child than one not so related. Such premise may be theoretically correct but practical experience has often proved it incorrect. The bonds of love between parent and child are not dependent upon blood relation and instinct, but may be forged as strongly in the crucible of day to day living. Out of the actual relationship of parent and child love grows. It is not merely a product of the biological function of conception and giving birth. To give paramount consideration to the principle of parental priority or ownership in custody decisions would often be an anathema to the best interest of the child."

49 Ala. App. at 661-662, 275 So. 2d at 341. *See generally Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

It would appear not only that the trial court acted consistently with this court's mandate that it apply a "best-interests" standard, but that it did so entirely consistently with § 12-15-71(a) and the policy concerns explained in *Striplin, Mathews, Borsdorf*, and the other cases cited above. The lead opinion in *W.T.M. II* was a plurality opinion. It stated:

> "In its determination of the child's best interest, the juvenile court should keep in mind § 12-15-62(c), Ala. Code 1975 (mandating that '[i]f a permanent plan is not presented [by DHR] to the court [within 18 months of an order placing a child in foster care] there shall be a rebuttable presumption that the child shall be returned to the family'); the decision in *R.C. v. Nachman*, 969 F.Supp. 682 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir.1998) (stating that DHR has the affirmative duty to facilitate family reunification whenever that goal is possible); and § 12-15-1.1, Ala. Code 1975 (stating the legislative goal of family reunification in juvenile dependency cases)."

802 So. 2d at 1094. As with the trial court's application of the mandated "best-interest" standard, I see no reason to conclude that the trial court did not "keep in mind" the foregoing items. None of these items individually, or collectively, foreclosed the trial court from reaching the judgment that it reached.

The first of the three items the lead opinion in *W.T.M. II* stated that the trial court "should keep in mind" is § 12-15-62(c), which provides, in pertinent part:

> "Within 12 months of any court order placing a child in foster care the court shall hold a permanency hearing. [DHR] shall present to the court at such hearing a permanent plan for said child. If a permanent plan is not presented to the court at this hearing there shall be a *rebuttable* presumption that the child should be *returned* to the *family*. *This provision is intended to insure that a permanent plan is prepared by [DHR] and presented to*

> *the court within 12 months of the placement of any child in foster care.* The purpose of the permanency hearing shall be to determine the permanency plan for the child which may include whether, and, if applicable, when, the child shall be (i) *returned to the parent,* (ii) placed for adoption wherein [DHR] shall file a petition for termination of parental rights, or (iii) referred for legal custody. The permanency hearing shall determine whether the plan will include placement in another planned permanent living arrangement in cases where the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, be placed for adoption, or be placed with a fit and willing relative, or with a legal custodian."

(Emphasis added.)[4]

In the present case, the trial court placed A.M.A. in the temporary custody of DHR on March 21, 1997. The trial court's orders from hearings on May 1, 1997, September 23, 1997, and November 6, 1997, all stated that the trial court concurred with the "plan for the child," which appeared to be to return the child to the mother, if possible. The trial court held a permanency hearing for the child on February

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[4] The lead opinion in *W.T.M. II* actually quoted § 12-15-62(c) as it read before it was amended, effective April 22, 1998, to change the applicable period for holding the permanency hearing from 18 months to 12 months. Regardless of whether a 12-month or an 18 month period is considered, however, the trial court in this case acted in a manner consistent with § 12-15-62(c).

18, 1998, less than 12 months after DHR had assumed custody. In the trial court's order dated February 19, 1998, the court stated that it concurred with the plan for the child and that the "permanent plan" for the child was reunification with relatives.[5] Based upon the foregoing, the trial court's handling of this case has been consistent with § 12-15-62(c).[6]

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[5] I note that the father, whose paternity had been established in February 1998, and a sister other than V.T. filed a joint petition for custody of the child in March 1998. After questions arose as to the suitability of the sister and her husband to receive custody of the child, the trial court denied the joint petition for custody in an order dated August 7, 1998, and stated that custody of the child would remain with DHR. The father unsuccessfully appealed to this court; no petition for certiorari review was filed with the Supreme Court.

[6] The intent expressed in § 12-15-62(c) is to ensure that DHR develops and proposes a timely permanent plan for a child who is placed in foster care, not to establish a presumption that restricts the trial court's broad discretion in actually reaching a final judgment regarding that child. *See* Ala. Code 1975, § 12-15-62(c) ("This provision is intended to insure that a permanent plan is prepared by [DHR] and presented to the court within 12 months of the placement of any child in foster care."). In neither § 12-15-62(c) (assuming a permanent plan is presented to DHR within 12 months) nor § 12-15-71(a) does the Legislature dictate a preference for a *dependent* child's placement as between a parent, other relative, or other custodian.

Further, by handling this case in a manner consistent with § 12-15-62(c), the trial court also has satisfied the policy concerns of the Adoption and Safe Families Act of 1997, 42

(continued...)

Moreover, I note that § 12-15-62(c) creates a *rebuttable* presumption, not a *conclusive* presumption. Even if DHR had not presented a permanent plan to the trial court within 12 months, under the facts of this case substantial evidence supports the trial court's conclusion that the presumption was rebutted.

Finally, even if a timely permanency hearing had not been held, and even if the evidence had not been sufficient to support a judgment that the presumption of § 12-15-62(c) was rebutted, that presumption is that the child should be "returned to the family." Even if § 12-15-62(c) somehow overrides the Legislature's express grant of broad discretion to the trial court in § 12-15-71(a) and required the trial court in this case to order that the child be "returned to the family," that is not possible in this case in the manner contemplated. The child was in her mother's custody until March 1997, when DHR obtained temporary custody and placed the child with foster parents. In June 1997, DHR removed the child from those foster parents and placed her in the care of S.P.; the child has remained in S.P.'s care since that time. Neither the father nor any other "family" member other than the mother has ever had custody of the child, except for limited visitation in accordance with the trial court's orders. Based upon the record, it appears that the mother has not attempted to regain custody of the child.

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[6] (...continued)
U.S.C. § 675(5), upon which the main opinion also seeks to rely. A permanency hearing was held within the applicable time and the child will no longer be in "foster care," but with a legal custodian the child knows as its "mother," subject to visitation rights with the father and V.T. and her husband.

V.T. has never had custody of the child; a "return" to V.T. is not possible.[7]

The lead opinion in *W.T.M. II* also stated that the trial court should consider the United States District Court's decision in *R.C. v. Nachman*, 969 F. Supp. 682 (M.D. Ala. 1997), *aff'd*, 145 F.3d 363 (11th Cir.1998), and Ala. Code 1975, § 12-15-1.1, regarding the obligation to seek "family reunification" whenever that "goal" is possible.[8] I first note that family reunification is a *goal*, not a strict requirement. Second, as noted above, there is no "reunification" at issue here.[9]

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[7] I further note that, in the present case, not only has the trial court deemed continued custody with S.P. to be in the best interests of the child, the court has never found V.T. to be a suitable alternative primary custodian.

[8] In *R.C.*, the court refused DHR's request to modify or vacate a consent judgment entered in a civil action brought by a defined class of children who were in foster care or under DHR's care. *R.C., supra.* We are not presented in this case with the need to address the scope of the *R.C.* consent decree or whether A.M.A. falls within the class of children defined therein.

[9] There is no argument before us that placement with V.T. is required by the United States Constitution because it would arguably be less restrictive of the father's residual parental rights. I also note that this case does not involve a termination of the father's parental rights, but only a custody placement, and that the father, as well as V.T. and her husband, will continue to have visitation with the child under the court's order, and with the agreement of S.P.

(continued...)

Further, the main opinion in this case assumes that "family" as that word is used in § 12-15-62(c) and § 12-15-1.1(1) and (8), includes V.T. and E.T., a paternal aunt and uncle. The Alabama Juvenile Justice Act (Ala. Code 1975, § 12-15-1 et seq.) does not define the term "family." I am concerned about the main opinion's extension of that term to include relatives other than a child's parents, particularly when those relatives have never had custody, and the child, therefore, cannot be "returned" to them within the contemplation of the statute.

If the term "family" was not intended as a reference to an *immediate* family to which a child can be *returned*, it is not clear where the definitional line for a "family" is to be drawn. By going beyond the child's parents and immediate family to draw this line, this court runs a risk of judicially defining all dependent children's best interests as placement anywhere within some extended "family tree." This is something the Legislature has not done, undoubtedly because it is something that, in many cases, will be at odds with the child's best interests.

Further, the reunification with "family" referenced in *W.T.M. II* in relation to § 12-15-1.1 and § 12-15-62 must be considered in light of the actual wording of those statutes.

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[9] (...continued)

Further, because a "permanent" placement has been made and DHR has been relieved of any further obligation to supervise the child, the main opinion's statements regarding the termination of parental rights appear to be misplaced. Because the child is no longer in foster care under the supervision of DHR, DHR no longer has an obligation to petition for termination of parental rights under Ala. Code 1975, § 26-18-5(b).

Nowhere does either statute actually call for a "reunification" with "family." Instead, § 12-15-1.1 provides, in pertinent part:

> "In furtherance of [the] purpose [of this Act], the following goals have been established for the juvenile court:
>
> "(1) To preserve and strengthen the child's *family* whenever possible, including improvement of *home* environment.
>
> "(2) To remove the child from the custody of his or her *parents* only when it is judicially determined to be in his or her best interest or for the safety and protection of the public.
>
> "(3) *To reunite a child with his or her parents* as quickly and as safely as possible when the child has been removed from the custody of his or her *parents*.
>
> "(4) To secure for any child removed from *parental custody* the necessary treatment, care, guidance, and discipline to assist him or her in becoming a responsible productive member of society.
>
> "....
>
> "(8) To achieve the foregoing goals in the least restrictive setting necessary, with a preference at all times for the *preservation of the family and the integration of parental accountability* and

> participation in treatment and counseling programs."

(Emphasis added.) Thus, the "reunification" goal expressed in § 12-15-1.1 is actually a goal for reunification with *parents*, § 12-15-1.1(3), not reunification with extended family generally. Similarly, § 12-15-62(c) contains references to a child's being "returned to the parent" and "return[ed] home." Considering the usage in these statutes of the term "family," in relation to the use of the terms "home," "parents," and "parental," I do not construe the term "family" in these statutes to mean extended family, particularly extended family with whom the child has never lived.

The main opinion in the present case essentially overlays onto the provisions of § 12-15-71 a requirement that if a *viable*[10] *relative* placement is possible, the court has no choice but to favor that placement. The statute does not require this. To the contrary, as stated in the main opinion in *W.T. v. State Department of Human Resources*, 707 So. 2d 647 (Ala. Civ. App. 1997):

> "The legislative intent underlying § 12-15-71 appears to be to give the juvenile court the *broadest possible range of placement options* in the dispositional phase of a dependency proceeding. We find no evidence that the legislature intended to accord a parent (even a noncustodial parent

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[10] The main opinion concludes that "we could affirm the [trial] court's redetermination of custody if that redetermination was supported by additional factual findings (based on the original record) indicating that the paternal aunt and uncle were either *unfit* or *unwilling* to have custody of the child." — So. 2d at — (emphasis in original omitted; emphasis added).

who may not have contributed to the child's becoming dependent) a presumption of fitness in the dispositional phase of a dependency case. The legislature is well aware of how to write a 'parental preference' presumption into a statute. *See, e.g.*, § 12-15-71(a)(6) ('There shall be a rebuttable presumption that children cannot be removed from custody of parents solely because of a need for emergency housing'); § 12-15-62(c) ('If a permanent plan is not presented [by DHR] to the court [within 18 months of an order placing a child in foster care] there shall be a rebuttable presumption that the child shall be returned to the family'). The legislature could have directed the juvenile court to place a dependent child with a nonparent only if it first found the parent or parents unfit. *However, 'no alternative contained in [§ 12-15-71] has any priority over the other alternatives. The trial court may choose that alternative which it finds to be in the best interests of the [dependent child].' Wallace v. Pollard,* 532 So. 2d [632,] 633 [(Ala. Civ. App. 1988)].

"We cannot conclude that the legislature's failure to incorporate the [*Ex parte] Terry* [, 494 So. 2d 628 (Ala. 1986),] presumption into the statute providing for the disposition of dependent children was an oversight that may be remedied by the judicial branch. The express references to a parental preference presumption elsewhere in the statute 'establish that the Legislature knew how to so limit or restrict the provisions of the statute if that was the intent.' *Dannelley v. State,* 397 So. 2d 555, 569 (Ala. Crim. App.), *cert. denied,* 397 So. 2d

577 (Ala.), *cert. denied*, 454 U.S. 856, 102 S.Ct. 305, 70 L.Ed.2d 151 (1981).

> " '....'
>
> "....
>
> "The standard to be used in the dispositional phase of a dependency proceeding is the 'best interest' of the child. '*The paramount considerations [in the dispositional phase of a dependency proceeding] are the welfare and best interests of the child. The relationship of a blood relative is subsidiary to such welfare.*' *D.K.G. v. J.H.*, 627 So. 2d [937,] 938 [(Ala. Civ. App. 1993)].
>
> > "'*Section 12-15-71(a)(5) empowers the court which has found a child to be dependent to make such orders as the court in its discretion shall deem to be for the welfare and best interests of the child. This court has interpreted that power broadly to mean that its only parameter is the best interests and welfare of the child.*'
>
> "*Minchew v. Mobile County Dep't of Human Resources*, 504 So. 2d [310,] 311 [(Ala. Civ. App. 1987)]."

707 So. 2d at 651 (emphasis added).

The main opinion takes issue with the citation to *W.T.* in this dissent, noting that certain of our statutes relating to dependency of children were amended in 1998, after *W.T.* was decided. The main opinion then proceeds to discuss

the portion of those amendments embodied in Ala. Code 1975, § 12-15-62(c). It is the amended version of § 12-15-62(c) that this dissenting opinion discusses at length. The main opinion, however, also quotes the following two sentences from amended § 12-15-62(c):

> "'The purpose of the permanency hearing shall be to determine the permanency plan for the child which may include whether, and, if applicable, when, the child shall be (i) *returned to the parent*, (ii) placed for adoption wherein the Department of Human Resources shall file a petition for termination of parental rights, or (iii) referred for legal custody. The permanency hearing shall determine whether the plan will include placement in another planned permanent living arrangement in cases where the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, be placed for adoption, or be *placed with a fit and willing relative, or with a legal custodian*.'"

— So. 2d at — (emphasis added).

I note two things regarding this language. First, as previously noted, the "return" of children referenced in the provisions is a return "to the parent," and a "return home," and not a return to some more broadly defined "family." Again, this is consistent with the manner in which the terms "family," "parents," "home," and "reunite" are used in § 12-15-1.1.

Second, and more importantly, I cannot see how the quoted passage overrides the discretion given to trial courts in Ala. Code 1975, § 12-15-71, or how it grants a "preference" to relatives over other options made available to trial courts in § 12-15-71. To the contrary, the quoted passage references placement "with a fit and willing relative" in the same list of options as it does placement "with a legal custodian." Syntactically, the two are placed on par with one another; there is no express preference for one over the other.[11]

The main opinion also relies upon 42 U.S.C. §§ 671(a) and 675, part of the federal Adoption and Safe Families Act of 1997. These federal statutes do not purport to prescribe rules of decision for state courts in dependency cases. Clearly, the rules of decision in our dependency cases are stated in Alabama statutes and in our precedents.[12] Nowhere does 42 U.S.C. § 671(a) or 42 U.S.C. § 675 or any other federal statute of which I am aware, state that the courts of Alabama must always select a relative over a

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[11] Even if a "preference" were to be given to "relatives" over all other options, this would appear to me to be the sort of case--i.e., where a child has lived with a nonrelative parent figure for most of her life--where the fact that such a preference is only that, i.e., a preference, and not a conclusive presumption, would allow for placement with someone who is not a relative.

[12] Even if § 671(a) did purport to alter the rule of decision for state courts, it would require only that a fit and willing relative be "considered" for preference.

nonrelative in a custody determination.[13] I do not believe Congress intended to dictate to the states that they must always place a child with a nonparent relative, even when such a placement is not in the best interests of the child. I certainly find no authority requiring that a federally imposed "relative" preference must override a state court's determination of a child's best interests. It is my conclusion that the decisions of this court, and those of Alabama trial courts, remain governed by the best interests of the children, which has always been the polestar for our decisions in this area.

Nothing in the record or the trial court's judgment in this case indicates that that court did not make the mandated "best-interests" determination or that in doing so it did not "keep in mind" the *rebuttable* presumption of § 12-15-62(c) and the "goals" stated in *R.C.* and § 12-15-1.1. When we remanded this case in *W.T.M. II*, this court was well aware of the record before the trial court, as it was of § 12-15-62(c), the Adoption and Safe Families Act of 1997, *R.C.*, and § 12-15-1.1. If the evidence in that record was insufficient as a *matter of law* to rebut some presumption favoring placement with a relative or to allow the trial court to use its discretion to determine that a permanent award of custody to S.P. was in the child's best interests, we could

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[13] Nor do I read the four cases from Louisiana, Vermont, and New York, cited by the majority for the proposition that "their state statutes ... [contain] a 'relative-placement preference' corresponding to federal legislation," to recognize such a proposition. — So. 2d at —. *See State ex rel. V.F.R.*, 815 So. 2d 1035 (La. Ct. App.2002); *State ex rel. K.A.M.*, 809 So. 2d 206 (La. Ct. App.2001); *Marylou L. v. Tenecha L.*, 182 Misc.2d 457, 458, 698 N.Y.S.2d 827, 829 (1999); *In re L.S. and K.S.*, 172 Vt. 549, 549, 772 A.2d 1077, 1078 (2001).

have said so then. We did not. Instead, we remanded the case to the trial court to exercise its discretion and to determine the best interests of the child based on that record. The trial court did that.[14]

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[14] Citing *Ex parte Perkins*, 646 So. 2d 46 (Ala. 1994), the main opinion states that "the trial court's judgment was based on an incorrect standard and it was necessary [in *W.T.M. II*] to remand the case to the trial court with directions that it (1) conduct another review of the record applying the correct standard and then (2) redetermine the custody award," and that "[t]his court had no authority to redetermine custody." — So. 2d at —. The rule recognized in *Ex parte Perkins*, however, is that deference is to be given a trial court's custody determination and that we will not reverse the determination, "'*unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown.*'" 646 So. 2d at 47 (quoting *Phillips v. Phillips*, 622 So. 2d 410, 412 (Ala. Civ. App. 1993)) (emphasis added). If the evidence of record in the present case "so fails to support" an award of custody to S.P. that, if such an award is made, we necessarily must on appeal reverse it as a matter of law, there would have been no need for this court to have remanded this case to the trial court for it to consider that issue. *Ex parte Perkins* recognizes that an appellate court may "decide that the facts are not as the trial court found them to be" if those "findings are not supported by the evidence and are clearly erroneous." *Id.* at 47. *See also P.A.T v. K.T.G.*, 749 So. 2d 454, 458 (Ala. Civ. App. 1999) (notwithstanding the presumption in favor of a trial court's custody determination, "when the evidence contained in the record does not support the judgment, we have no alternative; we must reverse it"). *Ex parte Perkins*, however, was not such a case; there was sufficient evidence in *Perkins* to support a custody finding in

(continued...)

As the main opinion now notes, "[t]he juvenile court's factual findings – that S.P. had had physical custody of the child for 3 ½ years, that S.P. had provided the child with a loving and nurturing environment, and that S.P. had given the child excellent care – are fully supported by the record." – So. 2d at –. There is no indication in the record that, in making the mandated determination of best interests, the trial court did not keep in mind the other factors referenced in this court's opinion in *W.T.M. II*. In other words, nothing in the record indicates that the trial court did not follow this court's mandate and the law of this case.

When evidence is received ore tenus, a judgment based on findings of fact by the trial court will not be reversed unless that judgment is shown to be plainly and palpably wrong; we are not allowed to reweigh the evidence, nor may we substitute our own judgment if the trial court's

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[14] (...continued)
favor of *either* party.

Ex parte Perkins stands for the proposition that where a trial court has imposed on a losing party a more difficult burden of proof as to an essential issue than it should have imposed (or imposed on a prevailing party an easier burden than it should have imposed), and there is in the record sufficient evidence from which the trial court, under the correct standard, reasonably could find in favor of either party as to that issue, the only appropriate course is to remand the case and allow the trial court to perform its role as the fact-finder. In the present case, there is substantial evidence on both sides of the best-interests issue, which is why this court was obligated in *W.T.M. II* to remand this case to the trial court and allow it to function as the fact-finder. On remand, the trial court performed that function.

judgment is supported by reasonable inferences from the evidence. *Ex parte Pielach*, 681 So. 2d 154 (Ala. 1996). This deferential standard applies to both explicit and implicit findings of fact. *See Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A.*, 608 So. 2d 375 (Ala. 1992).

As our Supreme Court recently stated in *Ex parte H.H.*, [Ms. 1002045, February 15, 2002] — So. 2d — (Ala. 2002):

> "'Neither the Court of Civil Appeals nor this Court is allowed to reweigh the evidence in this case. This case, like all disputed custody cases, turns on the trial court's perception of the evidence. The trial court is in the better position to evaluate the credibility of the witnesses ... and the trial court is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence, and to decide the issue of custody.'"

— So. 2d at — (quoting *Ex parte Bryowsky*, 676 So. 2d 1322, 1326 (Ala. 1996); *see also Ex parte Perkins*, 646 So. 2d 46, 47 (Ala. 1994) ("Only where the findings are not supported by the evidence and are clearly erroneous should an appellate court decide that the facts are not as the trial court found them to be.").

I believe that in order to reverse the judgment of the trial court, the majority must reweigh the evidence and substitute its judgment for that of the trial court. I therefore respectfully dissent from that reversal.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA
December 13, 2002

1012370

Ex parte S.P. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: W.T.M. v.S.P.; Ex parte W.T.M. and E.T. v. S.P.) (Bessemer Division of Jefferson Juvenile Court: JU-97-700254.01; Civil Appeals: 2001064, 2001065, 2001069)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied for failure to comply with Rule 39(d)(2), (d)(3), (d)(4), and (d)(5), Alabama Rules of Appellate Procedure.

NO OPINION.

LYONS, J. – Moore, C.J., and Houston, Johnstone, and Woodall, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.
Witness my hand this 13th day of December, 2002.
s/Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX C

IN THE FAMILY COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

IN THE MATTER OF: CASE NO. JU 97 700254.01

A.M.A., a minor child

ORDER

In accordance with an Order issued by the Alabama Court of Civil Appeals, October Term, 2000-2001, Case No. 2990593/2990655/2990775, instructing this Court to apply the "best interest" standard in this dispositional hearing of a dependent child, this Court finds that it is in the best interest of said minor child that her custody remain with Sharon R. Pearson who has had physical custody of said minor child for the past 3-1/2 years and has provided said child with a loving and nurturing environment, and excellent care. Child's Paternal Aunt and Uncle shall have the standard rights of visitation with said minor child as previously Ordered by this Court on March 7, 2000.

Clerk to mail a copy of this Order to parties, attorneys, and the Clerk of the Court of Civil Appeals.

DONE AND ORDERED THIS THE 22 DAY OF JUNE, 2001.

s/ Vincent J. Schilleci, Jr.
VINCENT J. SCHILLEC, JR.,
DISTRICT JUDGE

FILED IN OFFICE
FAMILY COURT
BESSEMER
DIVISION
JUN 22 2001
CLERK s/ [illegible]

APPENDIX D

802 So. 2d 1091

Court of Civil Appeals of Alabama.

W.T.M.
v.
S.P.

V.T.
v.
S.P.

State Department of Human Resources
v.
S.P.

2990593, 2990655 and 2990775.
May 18, 2001.

Following paternity testing, father petitioned for custody of child, who had been found dependent and placed in custody of Department of Human Resources (DHR). The Jefferson Juvenile Court, Bessemer Division, No. JU-97-700254, ruled that child would remain in custody of DHR, and father appealed. The Court of Civil Appeals, 736 So. 2d 1120, dismissed appeal. After paternal aunt and foster mother intervened in action, the Jefferson Juvenile Court, Bessemer Division, No. JU-97-700254.01, Vincent J. Schilleci, Jr., J., entered order awarding custody to foster mother and granting visitation to child's father and to child's aunt and her husband, and father appealed. The Court of Civil Appeals, Crawley, J., held that, although unwed father was not a "party" below, he had standing to

appeal trial court's decision awarding custody of child to foster mother.

Reversed and remanded.

Yates, P.J., filed opinion concurring in the result.

Thompson and Murdock, JJ., concurred in the result.

West Headnotes

[1] Action k13

13 ----
13I Grounds and Conditions Precedent
13k13 Persons Entitled to Sue.

One has standing if he or she has a real, tangible interest in the subject matter of the lawsuit. (Per Crawley, J., with one Judge concurring and three Judges concurring in the result.)

[2] Action k13

13 ----
13I Grounds and Conditions Precedent
13k13 Persons Entitled to Sue.

Standing turns on whether the party has been injured in fact and whether the injury is to a legally protected right. (Per Crawley, J., with one Judge concurring and three Judges concurring in the result.)

[3] Action k13

13 ----

13I Grounds and Conditions Precedent

13k13 Persons Entitled to Sue.

One has standing to bring his complaint into court if his stake in the resolution of that complaint assumes the proportions necessary to ensure that he will vigorously present his case. (Per Crawley, J., with one Judge concurring and three Judges concurring in the result.)

[4] Children Out-Of-Wedlock k20.11

76H ----

76HII Custody

76Hk20.11 Review.

Although unwed father was not a "party" below, he had standing to appeal trial court's decision awarding custody of child to foster mother; father had suffered an injury to a legally protected right because, although he did not have custody of the child, his parental rights had not been terminated, he had residual parental rights and responsibilities, and he had a real, tangible interest in the subject matter of the lawsuit. (Per Crawley, J., with one Judge concurring and three Judges concurring in the result.) Code 1975, § 12-15-1(24).

[5] Child Custody k76

76D ----

76DII Grounds and Factors in General

76DII(C) Factors Relating to Child

76Dk76 Welfare and Best Interest of Child.

Trial court's order granting custody of child to foster parent was entered during dispositional phase of dependency proceeding, and thus, trial court erred in applying the *McLendon* custody modification standard, rather than the best interest standard. (Per Crawley, J., with one Judge concurring and three Judges concurring in the result.)

[*1092] Kathryn L." Sunny" Lippert, Birmingham, for appellant W.T.M.

Joe W. Morgan III, Birmingham, for appellant V.T.

J. Coleman Campbell and Lynn S. Merrill, asst. attys. gen., for appellant Department of Human Resources.

Douglas Rogers, Birmingham, for appellee S.P.

Ginette A. Dow, guardian ad litem.

On Application for Rehearing

CRAWLEY, Judge.

The opinion of January 12, 2001, is withdrawn and the following is substituted therefor:

The juvenile court awarded custody of three-year-old A.M.A. to her foster mother, S.P. From that judgment, the child's father ("W.T.M."), the child's paternal aunt ("V.T."), and the Department of Human Resources ("DHR") appeal.

The parents of A.M.A. are not, and have never been, married to each other. In 1997, DHR filed a dependency petition, alleging that A.M.A., who was then an infant, was

dependent because, it said, she had been born a "crack baby" and her mother, it claimed, was using cocaine and **[*1093]** not providing adequate care for her. DHR obtained protective custody of A.M.A., and the child was placed in foster care.

In February 1998, W.T.M., who had established a relationship with A.M.A. at birth, was judicially determined to be her father. In March 1998, W.T.M., along with his sister S.B., petitioned for joint custody of the child, alleging that W.T.M. had suffered a disabling stroke and was unable to care for the child without help. After a dispositional hearing in August 1998, the juvenile court ordered that the child remain in the custody of DHR, with foster-care placement. W.T.M. and S.B. appealed that order to this court, but the appeal was dismissed as untimely. *See W.T.M. v. Department of Human Res.*, 736 So. 2d 1120 (Ala. Civ. App. 1999).

In May 1999, V.T., another sister of W.T.M. and the child's paternal aunt, moved to intervene and, along with her husband, petitioned for custody of A.M.A. In June 1999, S.P., the child's foster mother, also moved to intervene and sought custody. The juvenile court granted both motions to intervene and, following a dispositional hearing, awarded custody to S.P. and granted specific rights of visitation to the father as well as to V.T. and her husband.

The judgment states, in part:

> "After reviewing the law submitted by counsel for the parties, and hearing argument regarding the burden of proof required in this cause, this Court finds that said Petitions filed by child's Paternal Aunt and Uncle, and by child's Foster

Parent should be considered as Petitions to Modify the child custody Order issued by this Court on August 7, 1998, granting custody of said child to [DHR]. In modification proceedings, the standard of proof is set out in [*Ex parte McLendon*, 455 So. 2d 863 (Ala. 1984)], whether a change in custody would materially promote the welfare of the child. The reason for this stricter standard is that uprooting children and moving them can be very traumatic.

"This Court finds that there have been no substantial changes in circumstances as presented by the paternal Aunt and Uncle that would materially promote the welfare of the child by changing custody from the Foster Parent to the Paternal Aunt and Uncle. This Court notes that said child has been in the custody of her Foster Parent during the past 2 ½ years where according to DHR reports said Foster Parent has provided child with a loving, nurturing environment and excellent care. Due to the fact that said child was found dependent by this Court on September 23, [1997], pursuant to Title 12-15-71(a)(3)(c), Alabama Code 1975, a child found dependent may be awarded to a relative or other individual who, after study by [DHR], is found by the Court to be qualified to receive and care for the child. Therefore, the care, custody, and control of said minor child ... is hereby awarded to her Foster Parent [S.P.], with whom [DHR] placed said minor child approximately 2 ½ years ago."

[1][2][3][4] The guardian ad litem argues that the father does not have standing to appeal because he was not a

"party" below. The father responds by arguing that, but for his physical disability, he would have been a "party" petitioning for custody. Nevertheless, he claims, he has an interest in the litigation, because, if his sister is given custody of the child, he will have a greater role in the child's upbringing than if the foster mother is given custody. We agree with the father. One has standing if he or she has "a real, tangible interest in the subject matter of the lawsuit." *City of* **[*1094]** *Hoover v. Oliver & Wright Motors, Inc.*, 730 So. 2d 608, 610 (Ala. 1999).

> "Standing ... turns on 'whether the party has been injured in fact and whether the injury is to a *legally protected right*.'... 'One has standing to bring his complaint into court "if his stake in the resolution of that complaint assumes the proportions necessary to ensure that *he will vigorously present his case*." ' "

State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1027-28 (Ala. 1999) (emphasis in original) (citations omitted). The father has suffered an injury to a "legally protected right" because, although he does not have custody of the child, his parental rights have not been terminated. Moreover, he has the "residual parental rights and responsibilities" referred to in § 12-15-1(24), Ala. Code 1975:

> "RESIDUAL PARENTAL RIGHTS AND RESPONSIBILITIES. Those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including, but not necessarily limited to, the right of visitation, the right to consent to adoption, the right to determine religious affiliation, and the responsibility for support."

Clearly, the father has "a real, tangible interest in the subject matter of the lawsuit."

[5] The father raises several issues on appeal that we need not decide at this time because we conclude that the trial court erred in determining that the proceeding was a custody modification dictating the application of the *McLendon* standard, rather than the dispositional phase of a dependency proceeding requiring the application of the "best interest" standard. The record makes it clear that the proceeding was the dispositional phase of a dependency proceeding. This court has consistently held that the "best interest" standard applies to such proceedings. *See W.T. v. State Dep't of Human Res.*, 707 So. 2d 647, 650 (Ala. Civ. App. 1997); *Jones v. Webb*, 524 So. 2d 374 (Ala. Civ. App. 1988); *C.P. v. M.K.*, 667 So. 2d 1357, 1359 (Ala. Civ. App. 1994). *See also* § 12-15-71(a), Ala. Code (1975).

In the present case, the trial court applied the *McLendon* standard, which was too stringent a burden of proof. Therefore, this cause must be remanded with instructions for the trial court to apply the correct standard, the "best interest" standard. *See Ex parte Perkins*, 646 So. 2d 46 (Ala. 1994). In its determination of the child's best interest, the juvenile court should keep in mind § 12-15-62(c), Ala. Code 1975 (mandating that "[i]f a permanent plan is not presented [by DHR] to the court [within 18 months of an order placing a child in foster care] there shall be a rebuttable presumption that the child shall be returned to the family"); the decision in *R.C. v. Nachman*, 969 F. Supp. 682 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir. 1998) (stating that DHR has the affirmative duty to facilitate family reunification whenever that goal is possible); and § 12-15-1.1, Ala. Code 1975 (stating the legislative goal of family reunification in juvenile dependency cases).

The judgment of the juvenile court is reversed, and the cause is remanded with instructions to apply the "best interest" standard to the disposition of this dependent child.

APPLICATION GRANTED; OPINION OF JANUARY 12, 2001, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED.

PITTMAN, J., concurs.

YATES, P.J., and THOMPSON and MURDOCK, JJ., concur in the result.

[*1095]. YATES, Presiding Judge, concurring in the result.

I agree with the main opinion that the judgment should be reversed and the case remanded. It is clear that the trial court erred in applying the *McLendon* standard rather than the best-interests standard, whether we consider the case as a dependency proceeding or as a custody dispute.

I do not agree that the father is a party to the proceeding before this court, and, therefore, I conclude that he should not be considered by this court. However, awarding custody to the father's sister, V.T., and her husband, will ensure that the father has a continued relationship with his child. I think this is the only recourse for the father, because his appeal, seeking custody of the child, was dismissed in *W.T.M. v. Department of Human Resources*, 736 So. 2d 1120 (Ala. Civ. App. 1999).

In addition, DHR provided evidence that V.T. and her husband could provide a nurturing environment for the child; that they are financially able to provide for the child;

and that they have established a positive relationship with the child. V.T., her husband, and other family members presented convincing testimony indicating that it would be in the child's best interests to be placed in their care. Although it is not the province of this court to reweigh the evidence or to sit in judgment of disputed evidence, I think it clear that the trial court's judgment was not supported by the evidence. On remand, I would direct the trial court to enter a judgment awarding custody to the paternal aunt and uncle, in accordance with the reunification goals mandated by DHR.

APPENDIX E

IN THE FAMILY COURT OF
JEFFERSON COUNTY, ALABAMA
BESSEMER DIVISION

IN THE MATTER OF: CASE NO. JU 97 700254.01

A.M.A., a minor child

ORDER

Appearing are Genette A. Dow, Guardian Ad Litem for minor child, Amber Marie Allen; Ed Fawwal, Attorney for DHR; Sunny Lippert, Attorney for father, William Thomas Mason; Alice T. Dunn, Social Worker with DHR; Cynthia Umstead, Attorney for Eugene and Verna Trosch, Petitioners/Intervenors; Douglas Rogers, Attorney for Carl and Sharon Pearson, Petitioners/Intervenors.

Motion to Withdraw Carl Pearson from said Petition for Custody filed by Attorney Douglas Rogers on behalf of Carl and Sharon Pearson is granted. This Court notes that on September 23, 1997 said child was found dependent. Thereafter, a dispositional hearing was held on August 7, 1998 whereby custody of said minor child was awarded to Jefferson County Department of Human Resources. On April 30, 1999, The Court of Civil Appeals dismissed an appeal from this Court's judgment Ordering that child's custody be granted to the Alabama Department of Human Resources.

This Court subsequently granted a Petition to Intervene and Petition requesting custody of minor child filed on behalf of Paternal Aunt and Uncle, Eugene and Verna Trosch by Attorney Cynthia Umstead. This Court also granted a Motion to Intervene and a Petition requesting

custody of said minor child on behalf of the child's Foster Parent, Sharon R. Pearson.

After reviewing the law submitted by counsel for the parties and hearing argument regarding the burden of proof required in this cause, this Court finds that said Petitions filed by child's Paternal Aunt and Uncle and by child's Foster parent should be considered as Petitions to Modify the child custody Order issued by this Court on August 7, 1998, granting custody of said minor child to Jefferson County Department of Human Resources. In modification proceedings, the standard of proof is set out in *Ex Parte McLendon*, 455 So. 2nd 863, whether a change in custody would materially promote the welfare of the child. The reason for this stricter standard is that uprooting children and moving them can be very traumatic.

This Court finds that there have been no substantial change in circumstances as presented by the Paternal Aunt and Uncle that would materially promote the welfare of the child by changing custody from the Foster Parent to the Paternal Aunt and Uncle. This Court notes that said child has been in the custody of her Foster Parent during the past 2-1/2 years where according to DHR reports said Foster Parent has provided child with a loving, nurturing environment, and excellent care. Due to the fact that said child was found dependent by this Court on September 23, 1999, pursuant to Title 12-15-71(a)(3)(c), Alabama Code 1975, a child found dependent may be awarded to a relative or other individual who, after study by the Department of Human Resources, is found by the Court to be qualified to receive and care for the child. Therefore the care, custody, and control of said minor child, Amber Marie Allen is hereby awarded to her Foster Parent, Sharon R. Pearson, with whom The Department of Human Resources placed said minor child approximately 2-1/2 years ago.

Child's Paternal Aunt and Uncle, Eugene and Verna Trosch, and father shall have the following visitation:

1) The first and third weekends of each month from 6:00p.m. Friday until 6:00p.m. the following Sunday.

2) Each Christmas Day from 3:00p.m. until 3:00p.m. on the following New Year's Day.

3) Four weeks during the summer in two week intervals selected by the Father but upon written notice to the Custodian at least thirty (30) days in advance of such visitation.

4) Every other Thanksgiving Day from 10:00a.m. until 6:00p.m. of the same day, beginning this year.

5) Alternate AEA Spring holidays when the child is not in school commencing 6:00p.m. Friday preceding the week of Spring Vacation through 6:00p.m. Sunday, the day before the beginning of school, beginning the year that child begins school.

6) Other and different times of visitation may be exercised by agreement of the parties, without prejudice to the other periods of prescribed visitation.

7) Paternal Family is responsible for transporting child during visitation unless otherwise ordered by court.

DHR relieved of supervision and case file closed. Clerk to mail a copy of this Order to parties, attorneys, and DHR. Any party may appeal this decision within 14 days from entry of judgment by filing written notice with the Clerk of this Court and the Clerk of the Court of Civil Appeals.

DONE AND ORDERED THIS THE 7 DAY OF MARCH, 2000.

s/ Vincent J. Schilleci, Jr.
VINCENT J. SCHILLECI, JR.,
DISTRICT JUDGE

FILED IN OFFICE
FAMILY COURT
BESSEMER
DIVISION
MAR 08 2000
CLERK s/ [illegible]

APPENDIX F

736 So. 2d 1120

Court of Civil Appeals of Alabama.

W.T.M.
v.
DEPARTMENT OF HUMAN RESOURCES.

2971409.
April 30, 1999.

Following paternity testing, father petitioned for custody of child, who had been found dependent and placed in custody of Department of Human Resources (DHR). The Jefferson Juvenile Court, Bessemer Division, No. JU-97-700254, Vincent J. Schilleci, Jr., J., ruled that child would remain in custody of DHR, and father appealed. The Court of Civil Appeals, Monroe, J., held that trial court was not authorized to extend time for appeal.

Appeal dismissed.

West Headnotes

[1] Children Out-Of-Wedlock k20.11

76H ----
76HII Custody
76Hk20.11 Review.

(Formerly 76Hk20)

[See headnote text below]

[1] Infants k241

211 ----
211VIII Dependent, Neglected, and Delinquent Children
211VIII(F) Review
211k241 In General.

Trial court did not have authority to extend period in which father could appeal ruling that custody of his daughter would remain with Department of Human Resources, where basis for extension was mistaken calculation by father's counsel, and not error by clerk's office. Rules Civ. Proc., Rule 77(d).

[2] Appeal and Error k352.1

30 ----
30VII Transfer of Cause
30VII(A) Time of Taking Proceedings
30k352 Extension of Time
30k352.1 In General.

Intent of rule allowing extension of time period for filing appeal was to allow out-of-time appeal where fault for untimely appeal does not lie with party seeking to appeal. Rules Civ. Proc., Rule 77(d).

Kathryn L."Sunny" Lippert, Birmingham, for appellant.

J. Coleman Campbell and Lynn S. Merrill, asst. attys. gen., Department of Human Resources, for appellee.

MONROE, Judge

W.T.M. appeals from the trial court's judgment ordering that his child remain in the custody of the Alabama Department of Human Resources ("DHR").

In May 1997, DHR petitioned for custody of the child, alleging that the child was dependent and should be placed with DHR. The child's father was unknown at the time. Apparently, the mother stipulated to the child's dependency, and the trial court placed temporary custody of the child with DHR. Paternity tests were completed in February 1998; they established that W.T.M. was the child's father. In March 1998, W.T.M. and his sister, S.B., petitioned for joint custody of the child. A hearing was held and on August 7, 1998, the court entered a judgment finding that it was in the child's best interest for her to remain in the custody of DHR, and ordering that she remain with DHR.

[1] On August 21, 1998, DHR filed a post-judgment motion, which the court granted on September 2, 1998. In granting the post-judgment motion, the court amended its prior judgment to state that DHR had made reasonable efforts to prevent removal and ordered DHR to increase the father's visitation. In its order [*1121] of September 2, 1998, the court also denied post-judgment motions that had been filed by W.T.M. and S.B.

W.T.M.'s attorney made a motion to withdraw and the court granted the motion. On September 9, 1998, the trial court appointed S.B.'s attorney to represent W.T.M. on appeal. W.T.M.'s new counsel filed a notice of appeal on September 18, 1998. Thus, W.T.M. failed to appeal the judgment within the 14-day period allowed by § 12-12-70(a), Ala. Code 1975; see also Rule 55(dc), Ala.R.Civ.P. Section 12-12-70(a) provides that a notice of appeal from a judgment of the district court must be filed "within 14 days from the

date of the judgment." The court had denied W.T.M.'s post-judgment motion and amended its judgment on September 2, 1998. The notice of appeal should have been filed by September 16, 1998; it was filed on September 18, 1998.

On September 21, 1998, W.T.M.'s counsel filed a motion to extend the time for filing an appeal pursuant to Rule 77(d), Ala.R.Civ.P. stating:

> "1. Notice that counsel was appointed for this appeal was received on 9-15-98, the final day to appeal [sic] from the last order of this court.
>
> "2. Counsel was preparing for a trial set 9-16-98 p.m. in this court and neglected to review the date of the last order and also mistakenly calculated the 14 day appeal period based upon the date she was ordered as appointed for the appeal.
>
> "3. Attorneys for DHR, the mother and the child have no objection to the extension."

The trial court granted the motion and entered an order purporting to extend the time for appeal.

Rule 77(d), provides:

> "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except that upon a showing of excusable neglect based on a failure of the party to learn of the entry of the judgment or order the circuit court in any action may extend the time for

> appeal not exceeding thirty (30) days from the expiration of the original time now provided for appeals in civil actions."

Pursuant to Rule 77(dc), Ala.R.Civ.P., Rule 77(d) applies to district courts.

[2] Rule 77(d), exclusively, governs the situation in which a litigant claims that the clerk's office failed to give notice of the entry of the trial court's judgment. *Lindstrom v. Jones*, 603 So.2d 960 (Ala.1992). "The intent of Rule 77(d) was to allow an out of time appeal where fault for the untimely appeal does not lie with the party seeking to appeal." *Moser v. Crayton*, 726 So.2d 696 (Ala. Civ. App. 1998).

W.T.M. does not contend that notice of the judgment was not provided. There is no claimed error by the clerk's office. In fact, the basis for the extension is a mistaken calculation by W.T.M.'s counsel. Thus, Rule 77 is not applicable, and the trial was not authorized to extend the time for appeal. Consequently, W.T.M.'s notice of appeal is untimely and, therefore, this court lacks jurisdiction to consider this appeal. "An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court." Rule 2(a)(1), Ala.R.App.P. Because this court is without jurisdiction, it is required to dismiss the appeal ex mero motu. *Burton v. Burton*, 710 So.2d 1257, 1258 (Ala. Civ. App. 1997).

APPEAL DISMISSED.

ROBERTSON, P.J., and YATES, CRAWLEY, and THOMPSON, JJ. concur.

APPENDIX G

42 U.S.C. § 675. — Definitions

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title.

(B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(C) To the extent available and accessible, the health and education records of the child, including -

(i) the names and addresses of the child's health and educational providers;

(ii) the child's grade level performance;

(iii) the child's school record;

(iv) assurances that the child's placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;

(v) a record of the child's immunizations;

(vi) the child's known medical problems;

(vii) the child's medications; and

(viii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

(D) Where appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

(E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of State, regional, and national

adoption exchanges including electronic exchange systems.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum

(A) specifies the nature and amount of any payments, services, and assistance to be provided under such agreement, and

(B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive parents and child move to another State while the agreement is effective.

(4)

(A) The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the

reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

(B) In cases where -

(i) a child placed in a foster family home or child-care institution is the parent of a son or daughter who is in the same home or institution, and

(ii) payments described in subparagraph (A) are being made under this part with respect to such child, the foster care maintenance payments made with respect to such child as otherwise determined under subparagraph (A) shall also include such amounts as may be necessary to cover the cost of the items described in that subparagraph with respect to such son or daughter.

(5) The term "case review system" means a procedure for assuring that -

(A) each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child, which -

(i) if the child has been placed in a foster family home or child-care institution a substantial distance from the home of the parents of the child, or in a State different from the State in which such

home is located, sets forth the reasons why such placement is in the best interests of the child, and

(ii) if the child has been placed in foster care outside the State in which the home of the parents of the child is located, requires that, periodically, but not less frequently than every 12 months, a caseworker on the staff of the State agency of the State in which the home of the parents of the child is located, or of the State in which the child has been placed, visit such child in such home or institution and submit a report on such visit to the State agency of the State in which the home of the parents of the child is located,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship,

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the

court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (F)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement and, in the case of a child described in subparagraph (A)(ii), whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents;

(D) a child's health and education record (as described in paragraph (1)(A)) is reviewed and updated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care;

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless -

(i) at the option of the State, the child is being cared for by a relative;

(ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child;

(F) a child shall be considered to have entered foster care on the earlier of -

(i) the date of the first judicial finding that the child has been subjected to child abuse or neglect; or

(ii) the date that is 60 days after the date on which the child is removed from the home; and

(G) the foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and an opportunity to be heard in, any review or hearing to be held with respect to the child, except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a review or hearing solely on the basis of such notice and opportunity to be heard.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

(7) The term "legal guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and

decisionmaking. The term "legal guardian" means the caretaker in such a relationship.

APPENDIX H

[Excerpt from Sharon Pearson's Petition for Writ of Certiorari filed with the Supreme Court of Alabama:]

TO THE SUPREME COURT OF ALABAMA

S.P.	)	
	)	
PETITIONER	)	
	)	
v.	)	CASE NO. _____
	)	
W.T.M., V.T. and E.T.	)	
	)	
RESPONDENTS	)	

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS OF ALABAMA

TO THE SUPREME COURT OF ALABAMA:

Your Petitioner, Sharon Pearson (hearinafter Petitioner), by and through the undersigned counsel, hereby petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Civil Appeals of Alabama in this cause pursuant to rule 39 of the Alabama Rules of Appellate Procedure and shows the following:

1. This decision is issued by the Alabama Civil Court of Appeals has a material question requiring decision which is of first impression in Alabama. The opinion of the Civil Court of Appeals states that the 1998 amendments to § 12-

15-62(c) Code of Alabama (1975) have established a "relative preference" in the awarding of custody of dependent children and this preference "overrides" the Legislature's express grant of broad discretion to the trial court as established in § 12-15-71. . . .

. . . .

[Excerpt from Brief of Pearson in support of her Petition for Writ of Certiorari filed with the Supreme Court of Alabama:]

ARGUMENT

. . . .

The preference now established by the Civil Court of Appeals' opinion has its genesis, according to the opinion, in 42 U.S.C. § 671(a) under subsection 19 which is set out as follows:

> In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary [of Health & Human Services] which . . ."

. . .

> "(19) provides that the State *shall consider* giving preference to an adult relative over a non-related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant

State child protection standards." (Emphasis added.)

As can be noted in subsection 19, the State "shall consider" giving preference to an adult relative over a non-related caregiver when determining a placement for a dependent child.

The Civil Court of Appeals' opinion then states, "Other jurisdictions have recognized that, in their State statutes concerning permanency hearing for dependent children that there is a "relative-placement preference" corresponding to federal legislation." (opinion p. 10) The Alabama statute does not include a relative-placement preference and the Civil Court of Appeals, through this opinion has attempted to create this preference through *judicial fiat.*

Our courts have long held that the "best interest" of the child is the primary standard to be used in dependency cases. This standard follows the mandates of § 12-15-71(a) Code of Alabama (1975) . . . .

The foregoing statute gives the trial court judges in Alabama wide discretion in regard to child custody matters. In this regard, Judge Murdock, in his dissent has set out what the law is and has been in Alabama when he wrote ". . . To the contrary, the quoted passage references placement 'with a fit and willing relative' in the same list of options as it does placement 'with a legal custodian.' Syntactically, the two are placed on par with one another; there is no express preference for one over the other." The trial court, after hearing the evidence has followed the statute by placing custody of Amber with S.P.

The far reaching effect of this opinion of the Civil Court of Appeals, if it is allowed to stand, is to take discretion out of th ehands of the trial court judgmes of Alabama, circumvent the legislature of Alabama and to

establish a "relative preference" in regard to placement of dependent children in the State of Alabama.

. . . .

Supreme Court, U.S.
FILED
APR 18 2003
CLERK

No. 02-1370

In The

Supreme Court of the United States

S.P.,

Petitioner,

v.

V.T., E.T., and W.T.M.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Alabama

BRIEF IN OPPOSITION

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PARTIES

Corrections regarding the parties listed by the Petitioner is as follows:

Respondent, William Thomas Mason, the father of A.M.A., was not a Petitioner in the opinion at issue but was a party.

Respondent, Eugene Trosch, one of the current legal custodians of the child, has been treated as a party by every state court in this matter though he did not formally intervene as a party in the initial petition with his wife.

TABLE OF CONTENTS

	Page
Parties	i
Table of Contents	ii
Table of Authorities	iii
Reasons for Denying the Writ	1
1. There Is No Basis For Jurisdiction Of This Court	1
2. Child Custody Determination Is A Matter Of State Law	4
3. The Opinion In *W.T.M. III* Is Based On State Law	6
4. Petitioner Failed To Present Any Federal Issues To Any Alabama Court	7
5. Alabama Courts Are Not Bound By Decisions Of Other State Courts	9
6. Federal Law Does Not Confer Any Private Right To Individuals In Custody Disputes	11
Conclusion	12

APPENDICES:

Appendix A: Alabama Rule of Appellate Procedure 39(d) ..... App. 1

Appendix B: Table of Authorities and Statement of the Issues From Petitioner's Brief Submitted to the Alabama Court of Civil Appeals ..... App. 5

Appendix C: Table of Authorities, Points of Law and Page 6 from Petitioner's Brief In Support of Application For Rehearing Submitted to the Alabama Court of Civil Appeals ..... App. 7

TABLE OF AUTHORITIES

Page

CASES

Brannan v. State, 139 So. 2d 351 (Ala. 1962) 3

City of Prattville v. Joyner, 661 So. 2d 1158 (Ala. 1995) 10

Deboer v. Deboer, 509 U.S. 1301 (1993) 4, 5

Ex parte Allen, NO. 1012141, 2002 WL 31439754 (Ala. Nov. 1, 2002) 4

Ex parte Hails, 814 So. 2d 988 (Ala. 2001) 2, 3

Ex parte Hunte, 436 So. 2d 806 (Ala. 1983) 2

Ex parte Jackson, 551 So. 2d 304 (Ala. 1989) 3

Ex parte King, 797 So. 2d 1191 (Ala. 2001) 2

Ex parte Save Our Streams, 541 So. 2d 549 (Ala. 1989) 3

Ex parte Winchester, 544 So. 2d 967 (Ala. 1989) 3

Hathorn v. Lavorn, 457 U.S. 255 (1982) 3

Hickey v. Baxter, 800 F.2d 430 (4th Cir. 1986) 4

Howell Lumber v. City of Tuscaloosa, 757 So. 2d 1173 (Ala. Civ. App. 1997) 10

Lindsay v. State, 125 So. 2d 725 (Ala. 1960) 3

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 3

N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964) 3

Opinion of the Justices, No. 330, 558 So. 2d 390 (Ala. 1989) 2

Webb v. Webb, 451 U.S. 493 (1981) 9

TABLE OF AUTHORITIES – Continued

Page

White v. Reynolds Metals Co., 558 So. 2d 373 (Ala. 1989) 2, 10

Zajackowski v. Zajackowski, 932 F.Supp. 128 (D.Md. 1996) 4

STATUTES AND RULES

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1738A 4

42 U.S.C. §§ 670-679a 12

42 U.S.C. § 671 ..... 7, 8

42 U.S.C. § 675(5)(E)(i) 6, 7

42 U.S.C. § 11603 4

Ala. Code § 12-3-16 10

Ala. Code § 12-15-62 7

Ala. Code § 12-15-62(c) 7

Ala. Code § 12-15-65 7

Ala. Code § 40-14-40 2

Ala. Code § 40-14-41 2

Ala. R. App. P. 39(d) 1, 2, 3, 4, 8

REASONS FOR DENYING THE WRIT

This case, *W.T.M. v. S.P. and V.T. and E.T. v. S.P.*, 2002 WL 1003927 (2002), hereinafter referred to as *W.T.M. III*, was decided under state law. No federal question, federal statute, federal requirement relative to any state court and no private cause of action arising from any federal law are involved in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

The Alabama Supreme Court denied certiorari due to Petitioners failure to comply with mandatory provisions of the Alabama Rules of Appellate Procedure. Petitioner's statements regarding the discretionary review are misleading, as the Alabama Supreme Court has no discretion to review petitions improperly before the Court.

1. There Is No Basis For The Jurisdiction Of This Court.

In the Petition for Writ of Certiorari to this Court, the Petitioner states, "The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)". (Pet. Cert. at 2) 28 U.S.C. § 1257(a) provides for certiorari from "Final judgments or decisions rendered by the highest court of a state in which a decision could be had . . . " There was no such judgment or decision in this case. The highest court in this case is the Supreme Court of Alabama. The Petition for Writ of Certiorari to the Supreme Court of Alabama was " . . . denied for failure to comply with Rule 39(d)(2), (d)(3), (d)(4) and (d)(5), Alabama Rules of Appellate Procedure."

The Supreme Court of Alabama, with one exception, has always strictly and regularly followed this "procedural bar". The exception is an advisory opinion concerning a case pending in the Court of Civil Appeals in 1989, where

Alabama Legislature was in special session and the governor requested an advisory opinion. The Supreme Court of Alabama granted an advisory opinion without a Petition for Writ of Certiorari being filed. "Our exercise of this power is necessitated by your (the governor's) request and by the special legislative session that has been called to address the fiscal emergency created by the declaration in *White*, (See; *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989) *infra*) of the unconstitutionality of the corporate franchise tax, Alabama Code § 40-14-40 and 40-14-41." *Opinion of the Justices,* No. 330, 558 So.2d 390, 391 (Ala. 1989). The *Opinion of the Justices* appears to be the only case where the Supreme Court of Alabama has not strictly followed the requirements of Rule 39, Ala. R. App. P.

Petitioner cites *Ex parte Hails,* 814 So.2d 988, 990 (Ala. 2001) for the proposition that compliance with Rule 39, Ala. R. App. P. is not required. That statement of authority is misplaced as the quotation is from the dissent. The Petition for Writ of Certiorari in *Hails, id,* was denied for failure to comply with the provisions of Rule 39, Ala. R. App. P. *id.*

Petitioner also cites *Ex parte Hunte*, 436 So.2d 806, 810 (Ala. 1983) where there is the statement that the opinion that, while reversing the Court of Criminal Appeals found " . . . that it was not necessary to deal with the state's contention that the petitioner had not complied with Rule 39." (Pet. Cert. at 3) *Hunte, id,* had nothing to do with the procedural bar, as the Petition in *Hunte* complied with the requirements of Rule 39, Ala. R. App. P. *Ex parte King,* 797 So.2d 1191, 1194 (Ala. 2001) is also cited but was a case where there was compliance with

Rule 39, Ala. R. App. P. and the Petition for Writ of Certiorari was granted.

Three cases decided by this Court are cited by Petitioner for the proposition that " . . . a state procedural ground is not 'adequate' unless the procedural rule is strictly or regularly followed.'" (Pet. Cert. at 2) The first cases cited are *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) and *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964). Both of these cases arose out of the same set of facts, both had to do with the State of Alabama and the efforts of the state government to use the power of the State to drive the N.A.A.C.P. out of the State. In both N.A.A.C.P. cases, Rule 39 was complied with, and the Petition denied on grounds that were unrelated to the procedural grounds of Rule 39, Ala. R. App. P.

The third case cited by the Petitioner is *Hathorn v. Lavorn*, 457 U.S. 255, 263 (1982). *Hathorn* was another pretext case where this Court held "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." It was held by this Court in *Hathorn*, that there was no "independent and adequate" basis for the ruling by the Mississippi Court, which Court had wrongly invoked the procedural bar.

The Supreme Court of Alabama applies the requirements of Rule 39, Ala. R. App. P. in a manner that is strictly and regularly followed, without any pretext.[1] There

[1] See e.g. *Lindsay v. State*, 125 So.2d 725 (Ala. 1960), *Brannan v. State*, 139 So.2d 351 (Ala. 1962), *Ex parte Save Our Streams*, 541 So.2d 549 (Ala. 1989), *Ex parte Winchester*, 544 So.2d 967 (Ala. 1989), *Ex parte Jackson*, 551 So.2d 304 (Ala. 1989), *Ex parte Hails*, 814 So. 2d 988 (Ala.

(Continued on following page)

was no unusual or obscure procedural device in this case, merely the ordinary and regular application of Rule 39 Ala. R. App. P. There was no review by the highest court of the State, and there are no grounds to justify granting this Petition For Writ Of Certiorari.

2. Child Custody Determination Is a Matter of State Law.

Petitioner asserts "The Alabama Court's Decision Conflicts with Decisions of Other State Courts." (Pet. Cert. at 14) There are narrowly defined circumstances where federal jurisdiction is necessary to resolve conflicts in custody cases. This case is not one of them. The Parental Kidnapping Protection Act of 1980, 28 U.S.C. § 1738A is one of those circumstances. Federal jurisdiction is also appropriate where there are conflicting state custody determinations, as was the case in *Hickey v. Baxter,* 800 F. 2d 430, 431 (4th Cir. 1986). A similar situation exists in cases concerning The Hague Convention, and the substantive federal law pursuant to 42 U.S.C. § 11603. *Zajackowski v. Zajackowski,* 932 F.Supp. 128, 130 (D.Md. 1996).

A strikingly similar factual situation was discussed in an application for stay in *Deboer v. Deboer,* 509 U.S. 1301, 114 S.Ct. 1, 125 L.Ed.2d 755 (1993). Justice Stevens wrote:

> "Neither Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they might

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2001), *Ex parte Allen,* No. 1012141, 2002 WL 31439754 (Ala. Nov. 1, 2002).

> be better able to provide for her future and her education. As the Iowa Supreme Court stated: '[C]ourts are not free to take children from parents simply by deciding another home offers more advantages.' (Internal citations omitted)
>
> My examination of the opinions in the litigation persuades me that there is no valid federal objection to the conduct or the outcome of the proceedings in the Iowa courts." *Id* at 509 U.S. 1301.

The stay was denied.

There is no compelling federal jurisdictional issue involved in this case. There is no federal statute at issue, and no federal question involved in this custody determination. The Alabama Legislature passed legislation which was enacted into law, and which the Alabama court followed, as is the duty of the Alabama court. Courts of other states have the duty to follow the statutory law enacted by their legislatures. While there may be differences in the state statutes, and differences in state court opinions, this conflict does not present a federal question.[2]

There is no basis for federal jurisdiction in this child custody case; therefore, the Petition for Writ of Certiorari should be denied.

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[2] *See* Judge Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980,* "Resource Guidelines, Improving Court Practices in Child Abuse & Neglect Cases", published by the National Counsel of Juvenile and Family Court Judges, Reno, Nevada, 1995.

3. The Opinion In *W.T.M. III* Is Based On State Law.

Petitioner contends that the Court of Civil Appeals of Alabama relied upon federal law, and argues how the provisions of federal statutes should be interpreted. The opinion of the Court of Civil Appeals of Alabama, in *W.T.M. III* is clearly based upon State law. The dispositive statement in the opinion of the Court of Civil Appeals being "In the present case, DHR (the State Department of Human Resources) recommended, pursuant to 12-15-62(c) – and consistent with the mandate of 42 U.S.C. § 675(5)(E)(i) – that the child be placed with V.T. and E.T., her paternal aunt and uncle." (Pet. Cert. App. at A-11)

The opinion was based on Alabama statutes, the recommendation of the State Department of Human Resources, and the testimony and evidence presented at trial.

> We hold that the juvenile court erred by determining that it was in A.M.A.'s best interest to be placed in the custody of her foster mother, S.P.
>
> The juvenile court's factual findings – that S.P. had physical custody of the child for 3-1/2 years, that S.P. had provided the child with a loving and nurturing environment, and that S.P. had given the child excellent care – are fully supported by the record. However, those factual findings are insufficient as a matter of law, to overcome the statutory policies and preferences expressed in § 12-15-1.1 and § 12-15-62(c), Ala. Code 1975.
>
> Section 12-15-1.1 states, as a legislative goal for the juvenile court, that the court should "preserve and strengthen the child's family whenever

> possible" and should maintain "a preference at all times for the preservation of the family." See § 12-15-1.1(1) and (8). Section 12-15-62(c) states a preference for placing a dependent child who has been in long-term foster care with a relative over an unrelated caregiver. *W.T.M. III* at 3.

In reversing the trial court, the Alabama Court of Civil Appeals stated, "Given the father's limitations, awarding custody of the child to the paternal aunt and uncle is the nearest approximation to a real parent-child relationship possible for W.T.M. and A.M.A." *W.T.M. III* at 5.

There are two references to federal law in the opinion. The first reference explains a rationale for the passage of Alabama statutory law, and specifically to 12-15-62 and 12-15-65, Ala. Code, 1975. The other is a statement that Alabama law is " . . . consistent with the mandate of 42 U.S.C. § 675(5)(E)(i). (Pet. Cert. App. at A-11)

The dissent in *W.T.M. III* is the only place where any "reliance" is mentioned. "The main opinion also relies upon 42 U.S.C. §§ 671(a) and 675, part of the federal Adoption and Safe Families Act of 1997. These federal statutes do not purport to prescribe rules of decision for state courts and dependency cases." (Pet. Cert. App. at A-32)

The opinion of the Court of Civil Appeals of Alabama is based upon the law of Alabama. There is no federal issue to be determined in this case.

4. Petitioner Failed To Present Any Federal Issues To Any Alabama Court.

Petitioner did not argue, or present any evidence, concerning any federal question during the trial of the

case. On appeal, Petitioner did not argue any federal question to the Court of Civil Appeals of Alabama. Petitioner did argue federal law in the brief on the merits in her Petition for Writ of Certiorari to the Supreme Court of Alabama, but she did not properly perfect her appeal, and the Petition for Writ of Certiorari was denied for failure to comply with Rule 39, A. R. App. P.

The totality of any mention of federal authority, however slight, is revealing.

Attention is invited to Appendices B and C, which present significant pages from the Briefs of Petitioner, submitted to the Court of Civil Appeals of Alabama. The TABLE OF AUTHORITIES, in Brief of Appellee, shows that no federal case or statute appeared in the Brief. (App. B at 5, 6) The STATEMENT OF THE ISSUES demonstrate that the two issues argued by Petitioner were: "I. Was there sufficient evidence to support the court's order not granting the custody petition of the paternal aunt and uncle? and II. After remand, was the decision of the trial court in awarding custody to the foster parent so unsupported by the evidence as to be plainly and palpably wrong?" (App. B at 6) There was no mention of any federal authority.

In Petitioner's Brief In Support of Application for Rehearing, the TABLE OF AUTHORITIES contains a single federal citation, 42 U.S.C. § 671(a). Attention is invited to the only place in the brief where 42 U.S.C. § 671(a) appeared:

> "Emphasis was added to the phrase 'placed with a fit and willing relative.' The opinion then sets out the provisions of 42 U.S.C. 671(a) under subsection (19) as follows:

> '(19) provides that the state *shall* consider giving preference to an adult relative over a non-related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant State child protection standards.' (emphasis added in original.) (App. C at 9)
>
> The key words from subsection 19 are 'shall consider.'" *Id.*

The cited quotation is the total of all federal law, case, or statute presented to all of the Courts of the State of Alabama. Petitioner did not raise any federal claim in the Alabama courts and the Alabama Supreme Court did not rule on a federal issue, because Petitioner did not perfect her appeal.

This case is exactly like that in *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981), where it was held: "Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction. So ordered." *Webb* at 501-02.

Accordingly, the Petition For Writ Of Certiorari should not be granted in the case *sub judice.*

5. Alabama Courts Are Not Bound By Decisions of Other State Courts.

The first argument of Petitioner in her Petition for Writ Of Certiorari is that the decision of the Court of Civil Appeals of Alabama conflicts with decisions of appellate courts of other states. That argument is irrelevant because

Alabama law requires the Court of Civil Appeals to be governed by the decisions of the Supreme Court of Alabama.[3]

For example, the Court of Civil Appeals of Alabama held in *Howell Lumber v. City of Tuscaloosa,* 757 So.2d 1173, 1181 (Ala. Civ. App. 1997):

> "We note that the city anticipated that Howell Lumber's appeal and its cross-appeal would be heard by our Supreme Court, and not this court; our Supreme Court would have the power to limit or overrule *Reynolds Metals* (*White v. Reynolds Metals Co.* 558 So.2d 373 (Ala. 1989) or *Joyner* (*City of Prattville v. Joyner,* 661 So.2d 1158 (Ala. 1995) in the manner the city seeks. This court does not have the power (see Ala. Code 1975, *12-3-16*), and we are bound to follow *Reynolds Metals* and *Joyner*, both of which are contrary to the City's position." *Id.*

Alabama Supreme Court cases required the Court of Civil Appeals to reach the decision that it did in this case. Appeal from that decision was available to Petitioner. There is no authority for the Court of Civil Appeals to follow the law of any other State, and the citation to holdings of sister states was discussed as informational, not in an attempt to apply the law of any other state. Alabama law was followed in this case, as was the Constitution of Alabama of 1901, Alabama statutes, and holdings

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[3] "The decisions of the Supreme Court shall govern the holding and decisions of the Courts of Appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment *No. 328*." 12-3-16, Ala. Code, 1975.

of the Supreme Court of Alabama and the Court of Civil Appeals of Alabama.

The Petition for Writ of Certiorari should be denied.

6. Federal Law Does Not Confer Any Private Right To Individuals In Custody Disputes.

Petitioner argues that the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670, does not confer any right on private individuals to enforce its terms. (Pet. Cert. at 17) That act, just as the ASFA, is merely a statute that regulates the terms for providing funds to a state. Respondent agrees that there is no right conferred on any individual by the ASFA. The only remedy for violation of the Acts is the withholding of federal funding from states.

The right to custody of the minor child is not founded upon any federal statute. The custody determination in this case was based upon Alabama law, the recommendation of the Alabama Department of Human Resources, and the evidence and testimony at the trial of the case. Petitioner may not agree with the Alabama law as it exists but there is no right granted unto her by any federal law.

Petitioner does not have any private right under any state or federal law, considering the status of this case at this time. Especially important is the fact that she did not perfect an appeal to the Supreme Court of Alabama. Petitioner's "Questions Presented" is a mere pretext for her argument that it was in the best interest of the child to be in her custody.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent agrees with the Petitioner that the Adoption and Safe Families Act, 42 U.S.C. §§ 670-679a, does not confer private rights upon competing individuals in a child custody dispute. Respondent contends that this Honorable Court has consistently refused to disturb the decisions of state courts in matters of child custody absent legitimate federal/constitutional issues and is thus without jurisdiction to grant the Petition for Writ of Certiorari in this matter. The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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APPENDIX A

RULE 39(d), ALABAMA RULES OF APPELLATE PROCEDURE

(d) Form and Length of Petition. The petition shall comply with the provisions of Rule 32(b)(2) governing form and shall not exceed 15 pages (except in capital cases, in which event the petition shall not exceed 20 pages), as also provided in Rule 32(b)(2). The petition shall contain:

(1) The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, 39(a)(1)(A)-(E), supra, on which the petition is based – and in a death-penalty case a statement in accordance with 39(a)(2)(A) and (B) – provided that:

> (A) When subparagraph (a)(1)(D) is the ground for the petition, the petitioner must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or
>
> (B) Where it is not feasible to quote that part of the opinion of the court of appeals either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision;

(4) A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit; and

(5) A statement of the facts, if a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53. The statement of facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition.

(A) Statement of facts where application for rehearing was filed with court of appeals after an opinion or an unpublished memorandum was issued. If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and the party applying for rehearing is not satisfied with that statement, the party applying for rehearing in that court may, in the application, present to the court of appeals an additional or corrected statement of facts or the applicant's own statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, in order for the Supreme Court to consider those facts in addition to the facts as stated in the court of appeals' opinion or unpublished memorandum, the proposed statement of additional or corrected facts or the applicant's own statement of facts presented to the court of appeals in the application for rehearing must be copied verbatim in the statement of facts in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must include a verification that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing. If the petitioner does not

present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion or unpublished memorandum.

(B) Statement of facts where an application for rehearing was filed with court of appeals in a "no-opinion" decision or an opinion that does not state the facts. If a court of appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion or unpublished memorandum that does not contain a statement of facts, the applicant shall include in the application for rehearing the applicant's statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must include a verification that the statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(C) Statement of facts where no application for rehearing was filed with the Court of Civil Appeals. If the petition for a writ of certiorari seeks review of a decision of the Court of Civil Appeals and the petitioner has not filed an application for rehearing with the Court of Civil Appeals, and if the Court of Civil Appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion that does not contain a statement of facts, the petitioner shall include in the petition for the writ of certiorari the petitioner's statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the Court of Civil Appeals issues an opinion

containing a statement of facts and the party petitioning for the writ of certiorari is not satisfied with that statement of facts, the petitioner may, in the petition for the writ of certiorari, present to the Supreme Court a proposed additional or corrected statement of facts or the applicant's own statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the petitioner does not present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion.

APPENDIX B

THE CIVIL COURT OF APPEALS OF ALABAMA

W.T.M., V.T and E.T.	)	
APPELLANTS	)	
	)	
v.	)	**CASE NO.**
S.P.	)	**2001064/2001065/2001069**
	)	
APPELLEE	)	

ON APPEAL FROM THE JUVENILE COUNT OF JEFFERSON COUNTY, ALABAMA BESSEMER DIVISION

BRIEF OF APPELLEE SHARON PEARSON

ORAL ARGUMENT NOT REQUESTED

* * *

TABLE OF AUTHORITIES

Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996)..... 15

Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994) 15

Ex parte R.T.S, Case #1981967, (Ala. 2000) Supreme Court of Alabama (Slip opinions)..... 14

Flowers v. Flowers, 479 So. 2d 1257 (Ala. Civ. App. 1985)..... 15

Gamble v. Gamble, 562 So. 2d 1343 (Ala. Civ. App. 1990)..... 15

Payne v. Payne, 550 So. 2d 440 (Ala. Civ. App. 1989)..... 15

Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993)..... 15

Vail v. Vail, 532 So. 2d 639 (Ala. Civ. App. 1988)..... 15

W.T.M. v. Department of Human Resources 736 So2d 1120 12

STATUTES:

Title 12-15-71 (a) (3)(c) Code of Alabama (1975)..... 11

12-15-62(c) Ala Code, 1975 14

* * *

STATEMENT OF THE ISSUES

I. Was there sufficient evidence to support the court's order not granting the custody petition of the paternal aunt and uncle?

II. After remand, was the decision of the trial court in awarding custody to the foster parent so unsupported by the evidence as to be plainly and palpably wrong?

* * *

APPENDIX C

THE CIVIL COURT OF APPEALS OF ALABAMA

Ex Parte, W.T.M.	)	
W.T.M., V.T and E.T.	)	
APPELLANTS	)	
	)	**CASE NO.**
v.	)	**2001065/2001064/2001069**
S.P.,	)	
	)	
APPELLEE		

ON APPEAL FROM THE JUVENILE COUNT OF JEFFERSON COUNTY, ALABAMA

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF APPELLEE SHARON PEARSON

* * *

PARTICULAR POINTS OF LAW OR FACTS THE COURT OVERLOOKED OR MISAPPREHENDED

I. The Court overlooked or misapprehended facts of law in that by reversing the judgment of the juvenile court, the court has gone beyond its standard of review and "reweighed" the evidence in order to determine the "best interest" of the child.

II. The Court overlooked or misapprehended facts of law in that it has added a "relative preference" mandate to §12-15-62 Code of Ala. 1975.

* * *

TABLE OF AUTHORITIES

Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996) 1

Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996) 1, 2

Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994) 1

Flowers v. Flowers, 479 So. 2d 1257 (Ala. Civ. App. 1985) 2

Gamble v. Gamble, 562 So. 2d 1343 (Ala. Civ. App. 1990) 2

Payne v. Payne, 550 So. 2d 440 (Ala. Civ. App. 1989) 2

Phillips v. Phillips, 622 So. 2d 410 1

Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993) 1

Vail v. Vail, 532 So. 2d 639 (Ala. Civ. App. 1988) 2

W.T.M. v. Department of Human Resources 736 So2d 1120 4

STATUTES:

42 U.S.C. §671(a) 6

Ala Code 1975 §12-15-71 7

§12-15-62(c) 3

§12-15-62(c) Ala Code, 1975 3

§12-15-62(c) Code of Alabama, 1975 6

* * *

notify anyone or question the care of the child. The child was two months old at this time. (R-82) The trial court could have questioned why Ms. Trosch did not intervene in the care of the child at that time.

II. The lead opinion sets out the provisions of §12-15-62(c) Code of Alabama, 1975 as follows:

> "The purpose of the permanency hearing shall be to determined [sic] the permanency plan for the child which may include whether, and, if applicable, when, the child shall be (i) returned to the parent, (ii) placed for adoption wherein the Department of Human Resources shall file a petition for termination of parental rights, or (iii) referred for legal custody. The permanency hearing shall determined whether the plan will include placement in another planned permanent living arrangement in cases where the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, be placed for adoption, or be *placed with a fit and willing relative*, or with a legal custodian." (Emphasis added.)

Emphasis was added to the phrase "placed with a fit and willing relative." The opinion then sets out the provisions of 42 U.S.C. §671 (a) under subsection (19) as follows:

> "(19) provides that the State *shall consider* giving preference to an adult relative over a non-related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant

State child protection standards." (Emphasis added.)

The key words from subsection 19 are "shall consider."

* * *

(3)

Supreme Court, U.S.
FILED
MAY 2 2003
CLERK

No. 02-1370

IN THE

Supreme Court of the United States

S.P.,

Petitioner,

v.

V.T.; E.T.; and W.T.M,

Respondents.

(IN RE: IN THE MATTER OF A.M.A., A MINOR)

On Petition for Writ of Certiorari to
the Court of Civil Appeals of Alabama

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

TABLE OF CONTENTS

Table of Authorities ii

Reply Brief in Support of
Petition for Writ of Certiorari 1

Conclusion 2

Supplemental Appendix:

Appendix I
Excerpts from the Initial Reply Brief and Argument of W.T.M. in *Ex parte S.P.*, Ala. Supreme Ct. No. 1012370 (filed Oct. 10, 2002) A1

TABLE OF AUTHORITIES

Cases **Page**

Ex parte W.T.M., No. 2001065,
2002 WL 1003927 (Ala. Civ. App.
May 17, 2002) ("*W.T.M. III*") 2

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner submits this Reply to the Brief in Opposition submitted by Respondent W.T.M. to bring to the attention of the Court the statements made in the Supreme Court of Alabama by W.T.M.'s counsel about the federal issues involved there. In that court, W.T.M. insisted that federal law, including specifically the Adoption and Safe Families Act ("ASFA"), required the outcome.

In contrast with the position asserted by W.T.M. in this Court (i.e., that no issue of federal law is implicated by this case), in the Alabama Supreme Court W.T.M. took a different position against certiorari review of the May 17, 2002, decision of the Alabama Court of Civil Appeals. There, counsel for W.T.M. cited the ASFA in her table of authorities and further wrote:

> [The Juvenile Court's custody ruling] is insufficient as a matter of law to overcome the goal of reunification of the family expressed throughout . . . Federal mandates regarding foster care. The rationale for this [Court's] holding cites: 1)that federal mandates regulating foster care require child placement with relatives where appropriate; 2) that the purpose of ASFA is to prevent children from languishing in foster care . . . .

Initial Reply Br. and Argument of W.T.M. in *Ex parte S.P.*, Ala. Supreme Ct. No. 1012370, at 10 (filed Oct. 10, 2002) (reproduced in part in Supplemental Appendix I to this Reply Brief; quote at A4) (hereinafter "W.T.M.'s Ala. S. Ct. Br."). Further, at the Supreme Court of Alabama in

opposing certiorari review, W.T.M. criticized the trial court for not following federal law and praised the decision for which review is now sought:

> The [Juvenile Court] trial court failed to consider the rights of the father under the applicable federal mandates. . . . Thus, the Court of Civil Appeals in *Ex parte WTM*, 2002 WL 1003927 at 3,4 (Ala. Civ. App. 2002) indicated the specific federal mandates that the trial court failed to comply with upon remand and reversed the trial court again. . . . The petitioner [S.P.] urges this Honorable Court to ignore the federal statutes and federal precedent under which the State of Alabama must comply.

W.T.M.'s Ala. S. Ct. Br. at 11-12 (Supp. App. I, at A5). W.T.M. further cited the ASFA as one of the "statutory policies of protecting and preserving families" that the "Court of Civil Appeals correctly used . . . in reviewing W.T.M.'s parental rights." W.T.M.'s Ala. S. Ct. Br. at 13 (Supp. App. I, at A6). Petitioner contends that these positions of Respondent W.T.M. in the Supreme Court of Alabama conflict with the positions reflected on pages 5 and 11 of W.T.M.'s Brief in Opposition filed with this Court with respect to the presence of a question of federal law in the proceedings below.

CONCLUSION

As demonstrated, Respondent W.T.M. grossly understated here the scope of the presentation to the Supreme Court of Alabama of the existence of a question of

federal law in the proceedings below. In consideration of the conflicting positions taken by Respondent W.T.M., and for all the reasons set forth in S.P.'s Petition for Writ of Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SUPPLEMENTAL APPENDIX

APPENDIX I

[Excerpts from the Initial Reply Brief and Argument of W.T.M. in *Ex parte S.P.*, Ala. Supreme Ct. No. 1012370 (filed Oct. 10, 2002)]

S.C. NO. 1012370
THE SUPREME COURT OF ALABAMA

EX PARTE: S.P.
(In re: W.T.M. v. S.P.: Ex parte W.T.M. (In re: W.T.M. v. In the matter of A.M.A., a minor); V.T. and E.T. v. S.P.)

APPEALED FORM THE JUVENILE COURT
OF JEFFERSON COUNT, ALABAMA
(BESSEMER DIVISION)
(NOS. JU-97-700254.01)

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA
(CIVIL APPEALS NO. 2001064)
(CIVIL APPEALS NO. 2001065)
(CIVIL APPEALS NO. 2001069)

INITIAL REPLY BRIEF AND ARGUMENT OF W.T.M.

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TABLE OF AUTHORITIES

. . . .

STATUTES:

§ 12-15-1.1, Ala. Code 1975 ..... 8, 13

§ 12-15-1(24), Ala. Code 1975 ii

§ 12-2-2, Ala. Code, 1975 ii

Adoption and Safe Families Act OF 1997, Pub. L. 105-89, 111 Stat. 2115 (1997) 10, 13

12-16-62(c) Ala. Code, 1975 (amended in part 1998) ... 16

STATEMENT OF THE ISSUES

I. **THIS CASE IS NOT A MATTER OF FIRST IMPRESSION.**

II. **THE OPINION OF THE COURT OF CIVIL APPEALS IS NOT IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS.**

III. **THE PETITIONER'S STATEMENT OF JURISDICTION DOES NOT INVOKE JURISDICTION AND IS INSUFFICIENT AS A MATTER OF LAW.**

STATEMENT OF THE FACTS

. . . .

SUMMARY OF ARGUMENT

W.T.M. submits that the Court of Civil Appeal followed the law, precedent and the best interest of the child in its opinion dated May 17, 2002. RC v. Nachman, 969 F. Supp. 682 (M.D. Ala. 1997) and Ala. Code 1975, § 12-15-1.1 require reunification of the family as a goal whenever possible after a child has been removed from a parent.

The child was never "removed" from W.T.M.'s custody. W.T.M. has a due process right to parent his child to the best of his ability. The trial court failed to consider his right to parent his child. As the best way to protect W.T.M.'s relationship with A.M.A. is to grant custody to his sister, V.T. and her husband, E.T., the trial court was properly reversed to assure reunification of the family absent unfitness on the part of the parties from A.M.A.'s family.

The trial court erred as a matter of law and policy. The May 17, 2002 opinion is consistent with Terry and it's progeny. Thus, this case is not a matter of first impression nor is the opinion of the Court of Civil Appeals adverse to prior decisions of the Alabama Supreme Court.

. . . .

ARGUMENT

ARGUMENT I. THIS CASE IS NOT A MATTER OF FIRST IMPRESSION. THIS CASE IS NOT A MATTER OF FIRST IMPRESSION.

The petitioner alleges that this case is a matter of first impression before this Honorable Court. To support this contention, the petitioner cites Ex parte Bryowsky, 676 So. 2d 1322 (Ala. 1996). Bryowsky is not a dependency case but a custody case arising from a modification of a divorce decree.

Ex parte W.T.M., 2002 WL 1003927, at*3 (Ala. Civ. App. 2002) holds that the trial court's finding that custody is granted to S.P. because the child had resided with her for 3 ½ years, is insufficient as a matter of law to overcome the goal of reunification of the family expressed throughout the Rules of Juvenile Procedure, policies of the State and Federal mandates regarding children in foster care. The rationale for this holding cites: 1) that federal mandates regulating foster care require child placement with relatives where appropriate; 2) that the purpose for ASFA is to prevent children from languishing in foster care; 3) that the Department of Human Resources recommended reunification of this family; 4) that the only option on remand of the initial appeal in WTM II, was for the trial court to apply the correct standard of review under Perkins. Ex parte Perkins, 646 So.2nd 46, 47 (Ala. 1994).

The issues involved in this case are controlled by Ex parte D.J., 645 So. 2d 303 (Ala. 1994). In D.J., the father sought custody of his child but the trial court continued to ignore the rights of the father, awarding custody instead to the child's grandmother. This Honorable court affirmed the Court of Civil Appeals' conclusion that in a custody contest

between a parent and non-parent, the father is entitled to the presumption that the child's best interests will be best served by a custody award to the father absent a finding of unfitness, relinquishment or prior final decree removing custody from the father.

In WTM II, 802 So. 2d 1091 (Ala. Civ. App. 2001), the Court of Civil Appeals remanded the case to the trial court for consideration of the father's rights to the child and to apply the best interest of the child standard to the award of custody. The trial court failed to consider the rights of the father under the applicable federal mandates as well as the precedent set forth in D.J. Thus, the Court of Civil Appeals in Ex parte WTM, 2002 WL 1003927 at 3, 4 (Ala. Civ. App. 2002) indicated the specific federal mandates that the trial court failed to comply with upon remand and reversed the trial court again. Among the federal mandates exists the R.C. case, which set standards for foster care and dependency cases in Alabama due to children experiencing inappropriate placements by the Department of Human Resources. RC v. Nachman, 969 F. Supp. 682 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir. 1998)

The petitioner urges this Honorable Court to ignore the federal statutes and federal precedent under which the Department of Human Resources must operate and under which the State of Alabama must comply. The petitioner fails to indicate why DJ does not control this case. The petitioner has never argued the fact set forth in Ex parte WTM, that the child has had a substantial, ongoing relationship with W.T.M. since her birth and but for his debilitating stroke, would petition alone for the custody of his child. "Given the father's limitations, awarding custody of the child to the paternal aunt and uncle is the nearest approximation to a real parent-child relationship possible for WTM and AMA." Ex parte W.T.M., *supra* at 5.

ARGUMENT II. THE OPINION OF THE COURT OF CIVIL APPEALS IS NOT IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS.

W.T.M. has remained actively involved in AMA's life as has been allowed by DHR and the trial court. W.T.M. never had an order removing A.M.A. from his custody and he was never found to be unfit. W.T.M. had a stroke, which has left him with some physical and speech impairment. W.T.M. pays child support, participated in the trial court procedure as much as he was allowed and **never** missed a visit with his child after the child was taken into custody due to dependency issues involving her mother.

Under these facts, the Court of Civil Appeals correctly used the Terry standard in reviewing W.T.M.'s parental rights along with the statutory policies of protecting and preserving families. Ex parte Terry, 494 So. 2d 628 (Ala. 1986), Adoption and Safe Families Act, §§ 12-15-1.1, 12-16-62(c) Ala. Code, 1975 (amended in part 1998). The holding in Ex parte W.T.M., finding 3 ½ years in foster care with S.P. is insufficient as a matter of law to justify the award of custody to S.P., a non-parent, is consistent with Terry.

. . . .

CONCLUSION

W.T.M. asks this Honorable to deny the petition for certiorari as the opinion of the Court of Civil Appeals followed the law, policy and best interest of the child in ruling on this matter.

Respectfully Submitted,

s/ Kathryn L. Lippert
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Attorney for W.T.M., Father

. . . .